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Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

JOHNSON CONTROLS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is the judgment in *Int'l Union UAW et al. v. Johnson Controls Inc.*, 886 F.2d 871 (CA 7, 1989) and which was reversed by this Court in *Int'l Union UAW et al. v. Johnson Controls Inc.*, reported at 59 U.S.L.W. 4209 (March 20, 1991) entitled to be given res judicata effect so as to bar a litigant's Title VII claim challenging that identical employer's fetal protection policy at one of its other plant locations and where the litigant had not been afforded the opportunity to have presented its proofs and arguments to the district court?

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PETITION FOR A WRIT OF CERTIORARI

Local 322, Allied Industrial Workers of America, AFL-CIO (Local 322 AIW), plaintiff in the district court and appellant in the court of appeals, petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in *Local 322, Allied Industrial Workers of America, AFL-CIO v. Johnson Controls Inc.*, 921 F.2d 732 (7th Cir., No. 90-1259: January 11, 1991).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 921 F.2d 732 and is reproduced at pp. 1a-7a of the separately bound appendix to this *certiorari* petition (hereinafter "Pet. App."). The judgment of the Court of Appeals is reproduced at Pet. App. 8a. The opinion of the United States District Court for the Eastern District of Wisconsin is unpublished and is reproduced at Pet. App. 9a-26a and its judgment is reproduced at Pet. App. 27a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1991 (Pet. App. 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Petitioner's claim before the district court arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

The Petitioner's complaint was dismissed in its entirety on the basis that the judgment in *Int'l Union, UAW et al. v. Johnson Controls, Inc.*, 680 F.Supp. 309 (E.D. Wis.) *aff'd* 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S.Ct. 1522 (S.Ct. Dkt. 89-1215, March 26, 1990)[1] constituted res judicata and barred Petitioner from pursuing its claim that Johnson Controls Inc. by introducing a fetal protection policy at its Milwaukee battery plant on March 1, 1983 had denied females of equal employment opportunities in violation of Title VII.

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[1] On March 20, 1991 this Court reversed the Court of Appeals judgment and remanded the case for further proceedings consistent with this Court's opinion, *Int'l Union, UAW et al. v. Johnson Controls, Inc.*, 59 U.S.L.W. 4209, 4215 (March 20, 1991).

STATEMENT OF THE CASE

This case concerns whether Johnson Controls, Inc. ("the Employer" or "the Company") was properly permitted to invoke the equitable doctrine of res judicata to estop Local 322 AIW from continuing to prosecute its claim under Title VII that the Company's fetal protection policy (FPP) had unlawfully discriminated against females at the Company's Milwaukee, Wisconsin battery plant.

The judgment that the Company raised as a defense and claimed constituted res judicata was the judgment entered in *International Union, UAW, et al. v. Johnson Controls, Inc.*, 680 F.Supp. 309 (E.D. Wis. January 21, 1988) ("Johnson Controls I"), *aff'd*, 886 F.2d 871 (7th Cir. Sept. 26, 1989) (en banc) ("Johnson Controls II").[2]

A. Facts.

Local 322 AIW is a labor organization. It represents the production and maintenance employees employed by Johnson Controls at its Milwaukee, Wisconsin plant where batteries have been and continue to be produced.

Prior to March 1, 1983 all employees, females and males, represented by Local 322 AIW were afforded the same rights under a labor contract to use their seniority to either transfer to better paying jobs or to "bump" less senior employees when there was a lack of work. The Company had observed the provisions of the OSHA lead standard, 29 CFR § 1910.1025 as the standard that was to be applied to all of the employees filling all jobs covered under the labor contract the Company had with Local 322 AIW.

On March 1, 1983, the Company unilaterally introduced the FPP during the term of the labor contract that had been entered into on November 21, 1980 and was

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[2] This Court has since reversed the judgment in Johnson Controls II (*see* Footnote 1 *supra*).

to have remained in effect until at least November 9, 1983.[3]

Under the Company's FPP the Company unilaterally determined that certain jobs had become "unacceptable" for fertile females and that no longer would any fertile females be allowed to use their seniority to transfer, bump, or be promoted to such a job. An "unacceptable" job was one where within the prior twelve month period an incumbent employee in that job had but one blood lead level reading in excess of 30 μg/dl or where within the preceding twelve month period there had been but one air lead reading in the area in excess of 30 micrograms.

All fertile females regardless of what their own blood lead level was were totally barred from transferring, "bumping", or being employed in jobs the Company identified at any particular time as being "unacceptable".

The Company admitted in its answers to Local 322 AIW's first interrogatories that "Some jobs which would have been 'unacceptable' under the [FPP] on March 1, 1983, may have become 'acceptable' subsequently, and perhaps vice versa . . . the status of a particular job is determined when there is a question as to application of the [FPP] . . ."[4]

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[3] The FPP that Johnson Controls had introduced at its Milwaukee facility in March 1983 was identical to that which was involved before this Court in the matter of *UAW, et al. v. Johnson Controls, Inc.*, S.Ct. Dkt. No. 89-1215 (March 26, 1990), but for some reason the Company had introduced the FPP at its other plants in 1982. The employees employed at the Company's battery plant located in Milwaukee, Wisconsin were not included in the class as certified by the district court in Johnson Controls I, *see* 680 F.Supp. at 310.

[4] The actual duties performed in the particular job never were such as to be dangerous in and of themselves to the employee performing such duties. What caused the Company to consider a particular job "unacceptable" for fertile females was not the job duties, but whether either of two conditions had existed in the prior 12 month period, i.e., whether any past employee performing that

The Company's FPP also treated all fertile females not on any individualized basis but as if they were all members of a class and all at equal risk of becoming pregnant or having an unplanned pregnancy.

After the Company unilaterally implemented its FPP Local 322 AIW first pursued through arbitration certain grievances that had been initiated by female employees who had been denied their rights under the labor contract to transfer or bump into certain better paying jobs solely due to the Company's claim that such jobs under its FPP had become "Unacceptable" for fertile females.

B. The Proceedings Had Below.

Local 322 AIW in addition to pursuing grievances also initiated a charge of sex discrimination under Title VII with the EEOC on September 17, 1984. On March 12, 1985 Local 322 AIW received a right to sue notice. (Pet. App. 91a)

On March 19, 1985, Local 322 AIW filed its complaint in the district court claiming that the Company's FPP discriminated against females at the Company's Milwaukee battery plant in violation of Title VII's ban on sex discrimination. On May 28, 1985 the district court granted Local 322 AIW's motion permitting Local 322 AIW to file a first amended complaint. (The amended complaint is reproduced at Pet. App. at 52a-91a.)[5]

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job in the prior 12 month period had blood lead level readings in excess of 30 μg/dl *or* whether in that same prior 12 month period there had been one air lead reading above 30 micrograms. If either of those conditions existed the job at that point in time was then "unacceptable" for a fertile female, but if neither of the past conditions any longer existed, the job would then not be "unacceptable".

[5] The reason for the amended complaint was because an arbitrator had denied a grievance of one of the female employees. Local 322 AIW added a new Count II to its original complaint claiming that the award was contrary to public policy and should be vacated (*see* Pet. App. at 48a-51a).

On July 29, 1985 Local 322 AIW moved under Rule 42(a) of the FRCP to consolidate its claim under Count I, with that of an earlier filed claim of the UAW and where the identical FPP was being challenged and the identical defendant was involved and the same federal judge was assigned to both cases. On November 25, 1985, the district court denied Local 322 AIW's motion to consolidate the two claims (Pet. App. 45a-47a). On February 24, 1986, Local 322 AIW again moved under Rule 42(a) of the FRCP to have its claim under Count I consolidated with the proceedings in the UAW case. On September 24, 1986, the district court again refused to consolidate the two cases and it instead stayed the Local 322 AIW action. (Pet. App. 37a-44a)

On October 7, 1986, Local 322 AIW moved under Rule 24 FRCP to be permitted to intervene or be permitted to file an amicus brief in the UAW proceeding in order to demonstrate to the district court why it would be inappropriate to grant the Company's motion for summary judgment in the UAW proceeding without hearing the theories of Local 322 AIW as to why the FPP violated Title VII's ban on sex discrimination. On January 21, 1988, some fifteen (15) months later, the district court issued its order denying Local 322 AIW's motion to intervene or be permitted to file an amicus brief claiming, "[t]his Court seriously doubts what additional 'new' arguments could have been made by the Local [322 AIW] . . ." (Pet. App. 36a) On that same date the district court without ever having heard any evidence or arguments of Local 322 AIW issued its opinion and granted the Company's motion for summary judgment in Johnson Controls I, 680 F.Supp. 309 (E.D. Wis. 1/21/88). ["After carefully reviewing all the submissions from both parties and the law on this issue, it is the Court's conclusion that the fetal protection policy at issue does not violate Title VII, and the defendant's motion for summary judgment is hereby Granted."]

On January 28, 1988 the district court granted the motion of Local 322 AIW to reopen its case and set a status conference to be held. (Pet. App. 34a) On March 11, 1988 Local 322 AIW filed a motion with the Court of Appeals requesting leave to intervene in the proceedings then before it involving the appeal that had been taken by the UAW from the district court's summary judgment in Johnson Controls I. On March 14, 1988 the Honorable Walter J. Cummings, Circuit Judge, signed an order granting Local 322 AIW's motion. Thereafter, Johnson Controls raised objections to Judge Cummings' order of March 14, 1988 and Local 322 AIW requested to supplement the record; and on April 20, 1988, Judge Cummings issued another order granting Local 322 AIW's motion and denying Johnson Controls' opposition thereto.

On October 13, 1988 the district court issued an order staying the Local 322 AIW action that was then pending before it and asserting "Either party may petition to reopen the case, when appropriate, by way of a letter to the Court . . ." (Pet. App. at 33a)

Thereafter, Local 322 AIW was permitted to participate in the proceedings had before the Court of Appeals in Johnson Controls II and it presented its arguments to the Court of Appeals both by oral argument and by written brief. Local 322 AIW sought to have the Court of Appeals vacate the summary judgment granted the Company in Johnson Controls I and to have the UAW proceeding remanded and consolidated with Local 322 AIW's action then still pending before the district court in order to make a more complete record and have the district court make conclusions based on findings of fact instead of conclusions that had been based on unchallenged assumptions.

The Company conceded before the Court of Appeals in Johnson Controls II that the arguments and materials that Local 322 AIW was raising had not been raised or

presented to the district court prior to its granting of summary judgment in Johnson Controls I. The Company invoked a preclusionary principle and argued that the Court of Appeals could not consider those arguments or materials presented by Local 322 AIW because it could only look to the record as it had existed and the arguments that had been advanced to the district court at the time it had granted the Company a summary judgment in Johnson Controls I.[6]

On September 26, 1989, the Court of Appeals issued its opinion in *Johnson Controls II*, 886 F.2d 87 (7th Cir. 1989) (en banc) and on September 28, 1989 filed its Judgment which claimed to have been based solely on the record had in Johnson Controls I. (Pet. App. 30a).

On October 12, 1989 the district court issued an order lifting the stay in the Local 322 AIW action and stating that Local 322 AIW ". . . approached the Court with the position that certain issues remain undecided after the Seventh Circuit's decision. It seeks to demonstrate that Johnson Controls' fetal protection policy constitutes un-

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[6] The written briefs that were submitted to the Court of Appeals in Johnson Controls II have been submitted to this Court as part of the record that was certified to it in *Int'l Union, UAW v. Johnson Controls Inc.*, S. Dkt. No. 89-1215 (March 26, 1990). This Court can take judicial notice of those records that were before it. In the Company's brief to the Court of Appeals, the Company had argued ". . . the AIW attempt(s) to rely upon material and documents not presented to the district court. Of course, this Court can only look to the record as it existed at the time the district court issued its decision granting summary judgment" (citations omitted) (Company Answering Brief to Court of Appeals in Johnson Controls II, p. 23 n.3).

The Company in addition argued, "The AIW has made a number of arguments not included in the UAW brief. For the most part these arguments were not presented to the district court and therefore should not be considered in this proceeding." (Citations omitted) (Company Answering Brief to Court of Appeals in Johnson Controls II, p. 34 and *also see* n.4.)

lawful sex discrimination regarding those issues . . ." (Pet. App. 28a).

On November 11, 1989 the Company and even though it had argued that the Court of Appeals could not consider the arguments or materials presented by Local 322 AIW (*see* Footnote 6 *supra*), requested the district court to dismiss Local 322 AIW's claim on the basis that the claim should be barred by res judicata.

On January 23, 1990, the district court issued its opinion (Pet. App. 9a-26a), and judgment was entered January 24, 1990 (Pet. App. 27a) dismissing Local 322 AIW's complaint in its entirety on the basis that Local 322 AIW was barred by res judicata from continuing to pursue its Title VII claim on behalf of the females employed at the Company's Milwaukee, Wisconsin battery plant.

Local 322 AIW took a timely appeal to the Seventh Circuit Court of Appeals and on January 11, 1991, the Court of Appeals issued its opinion (Pet. App. 1a-7a) and judgment (Pet. App. 8a) affirming the district court's dismissal of the complaint on the basis that res judicata barred Local 322 AIW from continuing to pursue its Title VII claim challenging the Company's FPP.

REASONS FOR GRANTING THE WRIT

The judgment below permitting the Company to invoke the affirmative defense of res judicata to bar Local 322 AIW from having its proofs and theories litigated before the trial court as to why the Company's FPP had violated Title VII represents a major departure from and a conflict with the principles heretofore established by the prior decisions of this Court relative to the proper application of res judicata.

Unless this Court reverses the judgment of the court below the Company will have been permitted to evade its obligation to provide a remedy, under Title VII, to those females it has employed at its Milwaukee, Wisconsin bat-

tery plant and who have suffered monetary losses as a result of the Company's FPP, and even though the judgment in Johnson Controls II, which the Company claimed was a bar has since been reversed by this Court (*see* Footnote 1, *supra*).

Because the judgment below has departed from the principles established by this Court and because this Court has since reversed the judgment in Johnson Controls II, these are both important enough reasons why this case plainly calls for this Court's review.

THE DUE PROCESS RIGHTS OF A LITIGANT ARE ABRIDGED WHEN RES JUDICATA IS APPLIED TO BAR THAT LITIGANT FROM LITIGATING A CLAIM AND WHERE THAT LITIGANT HAD NOT BEEN AFFORDED THE OPPORTUNITY TO PRESENT ITS PROOFS AND THEORIES TO THE TRIAL COURT ON A RECORD THE LITIGANT HAD PARTICIPATED IN MAKING.

The district court recognized that there was no precedent to support the Company's request and stated, "the issue of whether a party that has been allowed to intervene on appeal is precluded from further prosecution of a companion case on the ground of *res judicata* does not appear to ever have been ruled on . . ." (Pet. App. 20a).

This Court, however, has previously laid down requirements or standards that are to be met when the federal courts are requested to apply an estoppel, including an estoppel by means of res judicata to bar a party from litigating a claim.

One of the most important of these standards is "[The requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate . . ." *Blonder-Tongue Laboratories v. University Foundation*, 402 U.S. 313, 329 (1971). Whether a party has "had a full and fair opportunity to

litigate" must be ascertained only after a careful inquiry has been conducted, *see Brown v. Felsen*, 442 U.S. 127, 132 (1979) ["Because res judicata *may* govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry . . ."]

The district court was aware that Local 322 AIW had never "had a full and fair opportunity to litigate" its proofs and arguments before the trial court because the district court had twice denied Local 322 AIW's earlier motions to consolidate the two cases and also denied Local 322 AIW's motion to intervene or even file an amicus brief while the Company's motion for a summary judgment was still before it in Johnson Controls I.

In light of this Court's recent decision in *Int'l Union UAW et al. v. Johnson Controls Inc.*, 59 U.S.L.W. 4209 (March 20, 1991), this Court has now made it clear that an employer may not discriminate against females simply because they are fertile. However, back when this case was before the district court the legal landscape surrounding Title VII had become somewhat muddled by the decisions of several courts of appeals that had permitted employers to establish employment practices that treated fertile females differently simply because of their fertility and resulted generally in the denial of equal employment opportunities to such females. *See Hayes v. Shelby Memorial Hospital*, 762 F.2d 1543 (CA 11 1984) and *Wright v. Olson Corp.*, 697 F.2d 1172 (CA 4 1982).

Local 322 AIW's proofs and arguments which the Company conceded had not been raised or presented to the district court in Johnson Controls I were: 1) that fertile females are not anywhere near all being at equal risk of having a pregnancy or unplanned pregnancy and therefore each of such females is entitled to be considered on her own individual characteristics and not to be limited

in employment opportunities because she is a member of a class; and 2) that the Company's characterization of what jobs it identified as "unacceptable" for females was neither factually or logically supportable.

The district court stated in Johnson Controls I "The [FPP] policy excludes women who are capable of bearing children from working in jobs where their blood lead level will rise above 30 micrograms" 680 F. Supp. 309, 310. This appears to be a finding of fact but in reality it was nothing more than an assumption and an assumption that didn't appear to have been challenged.

The Company's criteria for establishing a job to be "unacceptable" for fertile females simply had no causal relationship whatsoever to whether that female's blood lead level would rise to above 30 micrograms. Under the Company's criteria a young male employee with little seniority and who while in the job had one blood lead level reading above 30 micrograms in the *prior 12 month period*, would result in that job being unacceptable for all fertile females including a fertile female in her 50's with a great deal of seniority and therefore she would be precluded from "bumping" or transferring into that job and even though her blood lead level was in the low 20 microgram range or lower.[7] The same result would occur if there was but one air lead reading in the area of the job above 30 micrograms *in the entire prior 12 month period* and even though the employee in the job had a blood lead level well below 30 micrograms. That job would still be "unacceptable" for all fertile females under the Company's FPP and a fertile female employee could not bump or transfer into such a job.

Local 322 AIW was prepared to demonstrate through expert testimony that two employees could be working along side of each other in the same job where the air lead level was above 30 micrograms and one employee's

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[7] The facts would also reveal that she was a grandmother and her last child was had some 20 years ago.

blood lead level would be 20 micrograms or less and the other employee's blood lead level could be higher than 90 micrograms.

The reason for the difference in the blood lead levels is neither attributable to the air lead levels or performing the job, but rather is attributable to the individual's own psysiology, hygiene and work practices. There was no evidence to support any finding that blood lead levels have any correlation to the sex of the individual or that females as a class or as individuals will have higher blood lead levels than males have as a class or as individuals.

The importance of the above is that it undercuts the assumption that everyone working in a job that requires the handling of lead and where lead particles will be in the air is going to automatically incur harm to themselves. The fact is that the harm to any individual from lead is incurred only if the lead becomes ingested into the individuals' body system. In other words, working with lead may be dangerous, much like working with dynamite or being an astronaught going into space may be dangerous. If the individual, however, observes the proper hygiene and work practices and wears the proper safety equipment, then there need not be any rise in that individuals' blood lead levels just because the air lead level in that area is above 30 micrograms. It was pointed out in *United Steel Workers of America, etc. v. Marshall*, 647 F.2d 1189, 1259-1260 (C.A. D.C.), *cert. denied*, 459 U.S. 913 (1981) that there simply was no correlation between the air lead levels and the blood lead levels of any individual employees and that the latter was attributable to the variations in the individual worker's own physiology, personal hygiene, and work practices.

Even assuming that it was impossible for the Company to tell which women might become pregnant the fact would nonetheless remain that this would not have justified the Company's excluding fertile females from transferring to any so-called "unacceptable jobs" because

under the Company's FPP the criteria it used for defining what jobs were "unacceptable" for fertile females to transfer or bump into had no logical or causal relationship to an individual female's own physiology, personal hygiene or work practices and her own blood lead level. All fertile females were excluded from transferring or bumping into a job under the Company's FPP where some other employee performing that job in the prior 12 month period had but one blood lead reading in excess of 30 micrograms or where there had been but one air lead reading in excess of 30 micrograms.

The opinion for this Court in *Johnson Controls Inc.* has now made clear that the Company's argument ". . . that it must exclude all fertile women because it is impossible to tell which women will become pregnant while working with lead . . ." has no validity whatsoever under Title VII, *Johnson Controls Inc., supra*, 59 U.S.L.W. at 4214.

However, the legal landscape, back when Local 322 AIW had opted to intervene before the Court of Appeals in Johnson Controls II, was not that clear as evidenced by the district court's opinion in Johnson Controls I. The evidentiary emphasis in Johnson Controls I had focused on whether there was a significant risk of harm to the fetus from lead exposure; whether that risk was substantially confined to the offspring of females, as opposed to male workers; and whether a fetus is more sensitive to lead than a post-natal child. *See Johnson Controls I*, 680 F. Supp. at 310.

What Local 322 AIW had sought to do by intervening before the Court of Appeals was to attempt to show that there were additional issues, proofs and arguments to be presented relative to why the Company's FPP violated Title VII in respect to females other than simply comparing expert medical opinions on whether the risk of harm to a fetus was as great or greater than the risk of harm to the offspring of a male employee, *see Johnson Controls I*, 680 F. Supp. at 310-312. The expert medical

testimony that a male employee's reproductive system could be harmed if that male ingested a sufficient amount of lead into his system was not unimportant. However, its importance lay in the fact that if fertile female employees are viewed as individuals and not simply as members of a class and male employees likewise are viewed as individuals and not as members of a class, then the district court's assumption that there would be a greater risk of harm were the Company to permit a fertile female to perform a job rather than a male to perform that job simply has no evidentiary support and is illogical.

In other words, under the Company's FPP a female employee who happened to be fertile but was in her 50's and had her last child over 20 years earlier and whose blood lead level was below 20 micrograms was barred from transferring or bumping into a higher paying but so-called "unacceptable" job but a far younger male employee with far less seniority and still engaged in having offspring and whose blood lead levels were far in excess of 30 micrograms was permitted to remain or transfer into that higher paying job.

It was these proofs and arguments as well as the proofs and arguments related to the arbitrary criteria that the Company had used to identify a job as being "unacceptable" for all fertile females that caused Local 322 AIW to want to intervene before the Court of Appeals in an effort to demonstrate that the district court had simply not dealt with all the factual issues and theories that really were presented in the case of the Company's FPP and why the district court's judgment in Johnson Controls I should therefore be vacated and the proceeding remanded in order to allow a full and complete record to be made.

The Company conceded that the arguments and materials raised by Local 322 AIW had not been presented to the district court and because of this the Company

had argued, even after Judge Cummings earlier orders had issued, that such materials and arguments could not be considered by the Court of Appeals (*see* Footnote 6, *supra*).

The *opinion* in Johnson Controls II was totally silent as to attributing any arguments or identifying any of the evidentiary materials specifically to Local 322 AIW. However, the final judgment entered in Johnson Controls II was clear and it expressly provided that the Court of Appeals had heard the appeal only on the record made before the district court in Johnson Controls I and not as supplemented by Local 322 AIW (*see* Pet. App. 27a-28a). Such a final judgment was consistent with the Company's preclusionary arguments that it had advanced to the Court of Appeals.

Perhaps, with the benefit of hindsight, Local 322 AIW might not have been as cautious as it was about seeking review, but because the legal landscape was at that time far from clear and because of the importance, in light of the Company's having invoked the preclusionary principle that it did, Local 322 AIW believed that it was necessary for it in order to remove any doubts about its proofs and arguments being properly considered that it would proceed to prosecute its own action which had remained pending before the district court and where it would present such proofs and arguments and which the Company had conceded had not been litigated by it in Johnson Controls I.[8]

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[8] Had Local 322 AIW sought review of the judgment in Johnson Controls II, the Company was able to argue, just as it had before the Court of Appeals, that because the arguments and materials presented by Local 322 AIW had not been presented to the district court and because the Courts of Appeals judgment in Johnson Controls II was based on the record made in the district court, that therefore such matters raised by Local 322 AIW could not be considered by this Court (*see* Footnote 6, *supra*). *Also see Hormel v. Helvering*, 312 U.S. 552, 556-557 (1941).

Local 322 AIW chose to litigate its own claims before the district court because there was a doubt and a doubt raised by the Company as to whether Local 322 AIW had the necessary control to advance the arguments and proofs that it wanted to make in order to challenge the assumptions of the district court in Johnson Controls I. Local 322 AIW did not simply choose to file a new cause of action rather than take an appeal from an adverse judgment. *Cf. Federated Dept. Stores, Inc. v. Moite*, 452 U.S. 394, 398 (1981).

Several courts of appeals have held that before a litigant can be estopped from litigating its claim that one of the essential elements to be established is that such litigant had control over those proceedings that would permit it to seek meaningful review of the judgment that was claimed to bar the litigant's claim, *see Virginia Hospital Ass'n v. Baliles*, 830 F.2d 1308, 1312-1313 (4th Cir. 1987); *Benson & Ford Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-1176 (5th Cir. 1987); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 339 (5th Cir. 1982) (quoting Restatement (Second) of Judgments, 39 Comment C (1982) . . .).

In affirming the district court's judgment to dismiss Local 322 AIW's claim on the basis of res judicata the court of appeals asserted, "that conclusion [the UAW failed to present facts sufficient for a trier of fact to conclude that less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children . . .] was necessarily based on the whole record before us, including evidence put forward by Local 322 . . ." 921 F.2d at 735 (Pet. App. 6a). With all due respect to the court of appeals this is not what the judgment entered in Johnson Controls II would indicate and in light of the Company's having specifically argued that the materials and arguments presented by Local 322 AIW could not be considered it was hardly unreasonable for Local 322 AIW to conclude that the record for purposes of review re-

mained as it had been before the district court in Johnson Controls I and not as sought to be supplemented by the arguments and proofs advanced by Local 322 AIW.

The doctrine of res judicata was not intended to be used as a sword to prevent the litigation of issues that have not before been litigated but as a shield to shield a party from relitigating issues that it has already litigated. The proofs and arguments sought to be litigated by Local 322 AIW the Company had conceded had not been litigated in Johnson Controls I.

Local 322 AIW's intervention in the appellate proceedings had in Johnson Controls II did not afford it that "full and fair opportunity to litigate." *Blonder-Tongue Laboratories v. University Foundation*, 402 U.S. 313, 329 (1971) and this, of course, is the ultimate touchstone that is determinative whether a party, such as the Company, was entitled to invoke the affirmative defense of res judicata to bar Local 322 AIW from having its proofs and arguments as to why the Company's FPP violated Title VII fully litigated in the district court and upon a full and complete record having been made.

CONCLUSION

For the above-entitled reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. ——

Supreme Court, U.S.
FILED
APR 5 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

JOHNSON CONTROLS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1259

LOCAL 322, ALLIED INDUSTRIAL WORKERS
OF AMERICA, AFL-CIO,
Plaintiff-Appellant,
v.

JOHNSON CONTROLS, INC., Globe Battery Division,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 85 C 49—Robert W. Warren, *Chief Judge*

Argued November 8, 1990—Decided January 11, 1991

Before CUMMINGS, MANION, and KANNE, *Circuit Judges.*

MANION, *Circuit Judge.* Local 322 of the Allied Industrial Workers (Local 322) appeals the district court's dismissal of its challenge to Johnson Controls' fetal protection policy. The only question before us is whether Local 322 was a party in the case of *International Union, UAW v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989) (en banc), *cert. granted*, 110 S.Ct. 1522 (1990), and thus precluded by the doctrine of res judicata from reviving

its district court action following our ruling in favor of Johnson Controls. We hold that Local 322 was an actual party in that case, and therefore affirm the district court's conclusion that it is bound by that final judgment.

I. Procedural Background

In 1984 International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, several UAW local unions and a group of individual employees (hereinafter "UAW") sued Johnson Controls over its fetal protection policy before Judge Robert W. Warren of the Eastern District of Wisconsin. The UAW alleged that the policy, which seeks to prevent unborn children and their mothers from suffering the adverse effects of lead exposure, violated Title VII, 42 U.S.C. § 2000e, *et seq.*

On March 19, 1985 Local 322 commenced this suit, also before Judge Warren, and also alleging that Johnson's policy violated Title VII's sex discrimination ban. Local 322 moved to consolidate its case with that of the UAW, but the district court on November 25, 1985 denied the motion because discovery had not begun and the court lacked sufficient information about each case's factual background to make a decision on the need for consolidation. On February 14, 1986, Johnson moved for summary judgment. Local 322 on February 24, 1986 again sought to consolidate its case with that of the UAW. In the alternative, Local 322 asked for a stay until resolution of the UAW's dispositive motions. On September 24, 1986, Judge Warren stayed the proceedings in this case until the issues relating to the validity of the fetal protection policy were determined in the UAW case.

On October 7, 1986, Local 322 moved for permission to intervene in the UAW action under Fed.R.Civ.P. 24, or alternatively for permission to file an amicus curiae brief in response to Johnson's motion for summary judgment. On January 21, 1988, the district court denied Local 322's

Rule 24 motion because it was untimely, and also because it concluded that Local 322 could add nothing to the arguments already presented by the UAW. On that same date the court granted Johnson's motion for summary judgment, and the UAW appealed. *International Union v. Johnson Controls, Inc.*, 680 F.Supp. 309 (E.D.Wis. 1988).

On March 11, 1988 Local 322 moved this court for leave to intervene in the UAW's appeal. That motion requested that Local 322 receive "full rights" as a party, including "the right to file briefs and to be heard on oral argument." On March 24, 1988 we granted Local 322's motion to participate as an intervenor. We later denied Johnson's motion to reconsider, and permitted Local 322 to supplement the record with material from its district court action. Meanwhile, because Local 322 was participating as a party in the appeal, the district court on October 13, 1988 again issued an order staying the proceedings below. One June 12, 1989, we issued an order, over the UAW's objection, allotting 10 minutes of oral argument time to Local 322. Local 322 proceeded to file full briefs on the merits and participated in oral argument before this court.

After we issued our en banc opinion on September 26, 1989, Local 322 sought to reopen the district court proceedings, arguing by letter that issue remained open to it under our decision to show that Johnson's fetal protection policy violated Title VII. The district court granted Johnson's motion to dismiss, holding that Local 322 was barred by the doctrine of res judicata from relitigating its claim in the district court. This appeal followed.

II. Discussion

Res judicata applies when three elements are present: "(1) a final judgment on the merits in a prior action; (2) the identity of the cause of action in both the prior

and subsequent suits; and (3) the identity of parties or privies in these suits." *Crop-Maker Soil Serv. v. Fairmount State Bank*, 881 F.2d 436, 439 (7th Cir. 1989), quoting *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1364 (7th Cir. 1988). The federal doctrine of res judicata "serves the interests of judicial economy and finality" by preventing parties from relitigating identical causes of action. *Crop-Maker*, 881 F.2d at 438. Local 322 admits the first two elements. The union's only argument is that it was not a party to the lawsuit between Johnson and the UAW, and thus that there is no identity of parties between that action and this.

Local 322 argues that it never had full rights of a party in UAW's appeal before this court. In support it makes three related points: 1) Local 322 was not allowed to intervene before the district court, where the record was made. The Seventh Circuit merely affirmed the district court's decision on the record as presented by the UAW, and also affirmed the district court's decision to deny intervention to Local 322; 2) although the Seventh Circuit allowed Local 322 to intervene on appeal, it was "apparently" only for the limited purpose of determining whether the district court properly disallowed intervention below; and 3) the Seventh Circuit decision is based exclusively on the record presented by the UAW and does not address additional questions raised by Local 322. Our review of the record compels us to agree with the district court—Local 322 was in fact a party on appeal, its arguments were addressed by our prior decision, and it therefore must be bound by our judgment in favor of Johnson Controls.

The union is correct that we affirmed the district court's refusal to allow Local 322 to intervene at the district court level. In footnote 1, *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d at 874, we noted that:

> More than two years [after the UAW filed suit], Local 322 of the Allied Industrial Workers of Amer-

> ica attempted to intervene under Fed.R.Civ.P. 24 (a)(2). The district court denied the motion, and Local 322 has appealed. We affirm the district court's decision on the basis of the motion's untimeliness. *See Schultz v. Connery*, 863 F.2d 551, 552-55 (7th Cir. 1988).

However, that footnote said nothing about our later decision to allow Local 322 to participate as an intervenor on appeal. It merely affirmed the lower court's refusal to allow intervention in the district court, in response to a small portion of Local 322's brief related to that question. The major portions of Local 322's brief and oral argument were devoted to the merits of the fetal protection policy. That is because we granted Local 322 full rights as a party on appeal when we allowed Local 322 to intervene.

Local 322's "Motion for Leave to Intervene" argued that allowing it to intervene on appeal "would not only not result in any delay in the instant proceedings but would overall result in economizing the expenditure of judicial resources in that the ultimate decision of this Court would necessarily also be dispositive of [Local 322's] challenge to the FPP . . .". Local 322 moved "for leave to intervene with full rights as parties [sic], including the right to supplement the record [with discovery from its district court action] and the right to file briefs and to be heard on oral argument." On March 14, 1988, Judge Cummings for this court ordered that motion "GRANTED and Local 322, Allied Industrial Workers of America, AFL-CIO may participate in this appeal as an intervening appellant." Johnson Controls followed with a response in opposition to Local 322's motion to intervene and supplement the record, which was denied by Judge Cummings on April 20, 1988. After the oral argument date was set, Local 322 filed a "motion to permit the intervening plaintiff-appellant, Local 322 . . . some portion of time to present oral argument." Chief Judge

Bauer granted that motion on June 12, 1989, over the objection of the UAW, and allotted Local 322 one-third—10 minutes—of the plaintiffs-appellants' time.

There were no limitations placed on Local 322's participation in the appeal. Local 322 was allowed to supplement the record with information obtained during discovery with Johnson. Local 322 briefed and argued the merits of the fetal protection policy. Local 322 was listed as a party in the case's judgment. As the district court concluded, Local 322's contention that its appearance in the appeal was for a limited purpose is "patently untrue," and "a mischaracterization of [its] role in that action. . . ."

Local 322 finally argues that res judicata should not apply because the Seventh Circuit did not address all the arguments it raised in its briefs, and that it was therefore not given an opportunity to fully and fairly litigate its opposition to the fetal protection policy. Even if that were true, res judicata would still bar Local 322's attempt to continue litigating against the fetal protection policy. *See e.g. Alaska v. Andrus*, 429 F.Supp. 958, 964 (D. Alaska 1977) ("It is perhaps unfortunate that by operation of res judicata and collateral estoppel that the judgment herein may preclude further action in Washington, D.C. However, the State is entitled to its day in court on these issues and intervention in those proceedings is not its only choice. Indeed, it is only due to the fact that the intervenors requested to be allowed into this action that this judgment may be binding on them in the other case."). "Moreover, res judicata bars not only those issues that the parties actually litigated, but also any issue which the parties could have raised in the prior action." *Gray v. Lacke*, 885 F.2d 399, 404-05 (7th Cir. 1989) (citations omitted); *Crop-Maker*, 881 F.2d at 439.

However, our case is simpler because Local 322's claims were treated and resolved by the Seventh Circuit, although obviously not to Local's 322's satisfaction. Local

322's suggestion that the court did not address whether "other alternative acceptable practices and policies . . . could have been followed with far less discriminatory effects on fertile female's right to equal employment opportunities" is false. Although we wrote that "the UAW failed to present facts sufficient for trier of fact to conclude that less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children from the substantial risk of harm lead exposure creates . . .", 886 F.2d at 891, that conclusion was necessarily based on the whole record before us, including evidence put forward by Local 322. Nothing provided by the UAW or Local 322 met "the burden a Title VII plaintiff must carry in order to establish that an employer's policy is invalid on the basis of availability of less discriminatory alternatives." *Id.* Local 322's claims were raised and addressed, and now Local 322 is bound by its decision to become a party on appeal, and by our decision in favor of Johnson Controls.

The judgment of the district court dismissing Local 322's challenge to Johnson's fetal protection policy is therefore

AFFIRMED.

A true Copy:

Teste:

. . . . . .
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Date: January 11, 1991

Before: HONORABLE WALTER J. CUMMINGS, Circuit Judge

HONORABLE DANIEL A. MANION, Circuit Judge

HONORABLE MICHAEL S. KANNE, Circuit Judge

No. 90-1259

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Plaintiff-Appellant

v.

JOHNSON CONTROLS, INCORPORATED,
Globe Battery Division,
Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 85 C 409, Chief Judge Robert W. Warren

JUDGMENT—WITH ORAL ARGUMENT

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 85-C-409

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Plaintiff,

v.

JOHNSON CONTROLS, INC., GLOBE BATTERY DIVISION,

Defendant.

DECISION AND ORDER

[Filed Jan. 23, 1990]

Before the Court is the defendant's request that this suit be dismissed under the doctrine of *res judicata.*

I. BACKGROUND

On April 6, 1984, the United Auto Workers ("UAW") filed a complaint in this Court challenging the defendant employer's Fetal Protection Policy ("FPP") as violative of Title VII of the Civil Rights Act of 1984. The defendant implemented the FPP at its Milwaukee plant on March 1, 1983. On February 25, 1985, this Court certified a class of plaintiffs who were affected by the defendant's FPP. This class did not include plaintiff AIW. The defendant has a plant here in Milwaukee at which its produces batteries, and where the production and maintenance employees are and have been represented by the

AIW. On July 29, 1985, the plaintiff moved to consolidate this action with a parallel suit brought by the UAW, Case No. 84-C-472. This Court denied that motion on November 25, 1985. On February 26, 1986, plaintiff again moved to have this action consolidated with 84-C-472. This Court again denied the plaintiff's motion to consolidate on September 24, 1986. On October 7, 1986, the plaintiff moved this Court for leave to intervene in 84-C-472, but this Court denied that motion on January 21, 1988, the same date it entered its decision granting the defendant's summary judgment motion in 84-C-472 and dismissing the UAW's complaint in its entirety.

On February 18, 1988, the UAW filed a notice of appeal. On March 11, 1988, the plaintiff filed a motion with the United States Court of Appeals for the Seventh Circuit requesting leave to be permitted to intervene in the appeal. The Seventh Circuit granted that motion on March 14, 1988. Defendant's November 21 Letter to the Court Ex. 2 (Order of Circuit Judge Cummings). The defendant opposed this intervention by brief of March 17, 1988. The plaintiff replied to the defendant's opposition on April 20, 1988. Judge Cummings for the Seventh Circuit reviewed these submissions and denied the defendant's motion to reconsider the appellate court's decision to allow the plaintiff to intervene in 84-C-472.

On October 13, 1988, this Court issued an order in the case *sub judice* staying the proceedings pending resolution of the appeal of 84-C-472. The Seventh Circuit issued its *en banc* decision in that case on September 26, 1989. *Int'l Union, United Automobile, Aerospace and Agricultural Implemental Workers of America, UAW, et al. & Local 322, Allied Indus. Workers of America, AFL-CIO v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989) (*en banc*). The Seventh Circuit affirmed this Court's grant of defendant's summary judgment motion. After the issuance of the *en banc* decision, the plaintiff approached this Court with the position that certain

issues remain undecided. In an October 12, 1989 *Order*, this Court lifted the stay on the proceedings in this action and opened the case for statistical purposes. It also scheduled a status conference for November 28, 1989. Preceding and following that conference, the parties have submitted letter briefs to the Court containing their positions as to whether this action should be dismissed under *res judicata*. The Court considers those arguments presently.

II. PARTIES' ARGUMENTS

A. *Defendant*

The defendant begins by quoting the plaintiff's own language to the effect of if this Court allowed plaintiffs to participate in 84-C-472, plaintiff would be bound by this Court's decision. The defendant cites to the plaintiff's first motion to consolidate: this Court must "ultimately determine whether . . . the [defendant's] Fetal Protection Policy [was] lawful under Title VII" and "that ultimate legal determination . . . then would be dispositive of the liability issue in both actions." August 28, 1985 letter in support of plaintiff's motion to consolidate p. 3. The defendant also cites to this Court's stay of further proceedings in this action pending the outcome of the UAW case: "the entirety of [the plaintiff's] case hinges upon the determination of whether . . . the Company's [FPP] violates Title VII," and that the UAW's case "presents the same challenge." September 24, 1986 *Order* staying this action p. 5. The defendant further cites to this Court's denial of plaintiff's October 7, 1986 motion to intervene in the UAW case, where the Court noted that the two cases involved the identical issue and the same defendant. The defendant points to plaintiff's March 11, 1988 motion to intervene in the appellate proceedings of 84-C-472. The plaintiff requested to intervene in that proceeding "with full rights as parties, including the right to supplement the record . . .

and the right to file briefs and to be heard on oral argument." Plaintiff's Appellate Motion to Intervene p. 6. The defendant refers to other language of plaintiff in that same motion, specifically, ¶ 11:

> 11. Granting the AIW's motion for leave to intervene would not only not result in any delay in the instant proceedings but would overall result in economizing the expenditure of judicial resources in that the ultimate decision of this Court would necessarily also be dispositive of the AIW's challenge to the FPP in 85-C-409. . . .

Because the Seventh Circut granted the plaintiff's motion to intervene as requested, the defendant asserts that the plaintiff is bound by the Seventh Circuit's decision, and therefore that this case should be dismissed on the principle of *res judicata*. The defendant cites a number of cases that support the proposition that an intervenor is bound by the decision of the court with jurisdiction over the case in which it has intervened. As plaintiff requested of the Seventh Circuit leave "to intervene in these proceedings so as to permit this Court in one judicial setting to hear and decide whether the Employer's FPP, which is the identical FPP at all the UAW plants as it is at the AIW plant, is lawful under Title VII," the defendant argues that the plaintiff should be held to the letter of his motion to intervene, and thus prays that this Court dismiss this action on the ground of *res judicata*.

B. *Plaintiff*

The plaintiff initially accuses the defendant of "gamemanship" in filing its letter brief of November 21, 1989 delineating its position. Because it "only adds to the expense of litigation and the expenditure of limited judicial resources that could be better spent on other legitimate matters," Plaintiff's Letter Brief of November 22, 1989 p. 1, plaintiff requests that this Court impose sanc-

tions on the defendant under Fed.R.Civ. P. 11 for attorneys' fees in the sum of $400 because the plaintiff felt compelled to respond to the defendant's letter brief.

As to the merits of defendants's requested dismissal, the plaintiff cites first to footnote 1 of the appellate opinion, which it states supports its position. That footnote states:

> More than two years later, Local 322 of the Allied Industrial Workers of America attempted to intervent under Fed.R.Civ.P. 24(a)(2). The district court denied the motion, and Local 322 has appealed. We affirm the district court's decision on the motion's untimeliness. *See Schultz v. Connery*, 863 F.2d 551, 552-55 (7th Cir. 1988).

Plaintiff asserts that this Court's order of January 21, 1988 denying the plaintiff's motion to intervene in 84-C-472 was affirmed by the *en banc* decision of the Seventh Circuit, and consequently that plaintiff has never been a party to the proceedings in 84-C-472 and cannot be bound under the principle of *res judicata*. "Since the plaintiff herein was never a party to the proceedings ir 84-C-0472, it cannot be bound under the principle of *res judicata* as would be the case with the actual plaintiffs in 84-C-0472." Plaintiff's Letter Brief of November 22, 1989 p. 2. Although the plaintiff admits that the principles of collateral estoppel can control portins of this action, it asserts that it would suffer prejudice were this Court to dismiss this suit, as just because the UAW did not make an adequate factual record below does not mean that plaintiff should be bound and limited by that factual record. The plaintiff opines that there are genuine issues of material fact this Court has not addressed, and that because the Seventh Circuit affirmed this Court's order denying intervention of the plaintiff in 84-C-472, that it should not now be precluded from presenting those factual issues.

C. *Plaintiff's Response*

The plaintiff in its response to the defendant's pre-status conference letter brief encloses a copy of the Seventh Circuit's judgment in 84-C-472, which plaintiff states "evidences . . . that it was affirming this Court's judgment in 84-C-472 to which the plaintiff herein has not been a party." Plaintiff's Letter Brief of December 5, 1989 p. 1. Further, the plaintiff states that "the Seventh Circuit expressly affirmed this Court's denial of plaintiff's motion wherein plaintiff had sought under Rule 24 FRCP before this Court to be permitted to intervene in 84-C-472." *Id.* Plaintiff thus concludes that judgment in 84-C-472 is not *res judicata* relative to plaintiff's claims in this action.

The plaintiff examines each of the cases the defendant cites, distinguishing them from the case at bar on the ground that they concern parties granted the right to intervene before the district court under Fed.R.Civ.P. 24, and which thereafter participated fully in the proceedings before the district court, contrasted to this Court's denial of plaintiff's right to intervene in 84-C-472. The plaintiff also argues that "while plaintiff was permitted to argue before the Seventh Circuit. that the Seventh Circuit nonetheless really limited the plaintiff's appearance before it to only whether this Court had properly denied plaintiff's motion under Fed. R. Civ. P. 24 (a)(2) and the Seventh Circuit simply affirmed this Court's denial of plaintiff's motion to intervene." *Id.* at 3. Plaintiff also dismisses its participation on the appellate level as "only for the limited purpose to determine whether or not plaintiff should've been permitted to intervene under Fed. R. Civ. P. 24 (A)(2) and the Seventh Circuit simply affirmed this Court's denial of such motion made by plaintiff." *Id.* at 4 (citation omitted). Plaintiff thus concludes that it is not a party to the proceedings to 84-C-472 because Judge Coffey does not refer to the AIW as a party in the appellate opinion, and that it is not

bound by the Seventh Circuit's opinion on the ground of *res judicata*. The plaintiff renewed its request for sanctions under Rule 11.

D. *Defendant's Response*

The defendant first avers that the cases that it cited in its letter brief, although involving intervention at the district court level, are fully applicable to intervention at the appellate stage. "To hold otherwise would make intervention at the court of appeals level meaningless. Surely, the Seventh Circuit Court of Appeals would not have taken the very unusual step of allowing the AIW to intervene if it were just a meaningless act without any consequences for the parties." Defendant's Letter Brief of December 11, 1989 pp. 1-2. Second, the defendant asserts that plaintiff's argument that it was not a full party before the Court of Appeals because it was only allowed to intervene for the purpose of appealing this Court's denial of its request to intervene at the district court level is misleading to the Court, as in its motion to intervene, plaintiff asked the Seventh Circuit to be allowed to participate "with full right as parties." Further, the defendant points out that the Seventh Circuit granted the plaintiff's motion to intervene without limitation, the plaintiff filed full briefs on the merits of the case, supplemented the appellate record with factual materials from this action, and argued the merits of the case before the original three-judge panel and, by court order, over the objection of the UAW, before the Seventh Circuit *en banc*. The defendant also advances that the Seventh Circuit decided issues raised on appeal only by the plaintiff, and the Court's judgment named the AIW as a party. The defendant thus concludes that plaintiff's argument that its intervention was limited to the issue of the appeal of this Court's denial of consolidation is completely false.

The defendant addresses the plaintiff's argument predicated on footnote 1 to the appellate opinion. The plaintiff interprets this statement as an affirmance of this Court's denial of plaintiff's motion to intervene; the defendant points out, however, that the Seventh Circuit in this statement says nothing of rescinding its earlier order allowing plaintiff to intervene. The defendant thus asks this Court to dismiss this action, or in the alternative, apply the Seventh Circuit's decision in 84-C-472 to the pending motion for summary judgment and dismiss the AIW action on the ground that the FPP is lawful as a matter of law.

III. RELEVANT CASE LAW

Research yields a paucity of decisions in which appellate courts have addressed the issue of intervention after its denial at the district court level. *See* 7C Wright & Miller, Federal Practice and Procedure § 1916 n. 24 (citing two cases allowing intervention on appeal: *Atkins v. State Board of Education of North Carolina*, 418 F.2d 874 (4th Cir. 1969); *Hurd v. Illinois Bell Tel. Co.*, 234 F.2d 942 (7th Cir. 1956)). Judge Cummings' March 14, 1988 order allowing the AIW to intervene and April 20, 1988 order denying the defendant's motion to reconsider this decision do not aid the Court, as no authority is cited for the Seventh Circuit's decisions. See Defendant's November 21, 1988 Letter Brief Exhibits 2 & 3. In *Auto Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965), the United States Supreme Court stated, in discussing the propriety of intervention in appellate review of NLRB proceedings: "The Federal Rules of Civil Procedure, of course, apply only in the federal district courts. Still, the policies underlying intervention may be applicable in appellate courts." Federal Rule of Appellate Procedure 15(d) provides for interventions in administrative appeals, which was the case in *Scofield*. The policies of Fed.R.Civ.P. 24(a)(2) have been considered in determining the propriety of this type of intervention

at the appellate level. *See State of Tex. v. U.S. Dept. of Energy*, 754 F.2d 550, 552 (5th Cir. 1985) (appellate court making intervention determination looks to Rule 24(a)(2)). Also, this is not a case in which at issue is a party's right to intervene on appeal due to the possibility of a judgment on which that party's rights could be precluded under *res judicata*. *See, e.g., Textile Workers Union of America v. Allendale Co.*, 226 F.2d 765, 767-68 (D.C. Cir. 1955).

On a motion for leave to intervene at the appellate level, the District of Columbia Circuit Court of Appeals stated in *Amalgamated Transit Union Intern. v. Donovan*, 771 F.2d 1551, 1552-53 (D.C. Cir. 1985):

> A court of appeals may allow intervention at the appellate stage where none was sought in the district court "only in an exceptional case for imperative reasons." *Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1353 (9th Cir. 1984), *rev'd on other grounds*, —— U.S. ——, 105 S.Ct. 2297, 85 L.Ed.2d 692 (1985); *Spring Construction Co. v. Harris*, 614 F.2d 374, 377 n.1 (4th Cir. 1980); *In re Grand Jury Investigation*, 587 F.2d 598, 601 (3d Cir. 1978); *McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962).

In a footnote to this string cite, that court related:

> No provision in the Federal Rules of Appellate Procedurfe provides for intervention on appeal, except in proceedings to review agency action. Fed.R.App.P. 15(d) . . . . Although the Supreme Court has recognized that "the policies underlying intervention may be applicable in appellate courts," [citing *Scofield*] courts of appeals have developed their own standards of intervention in order to take account of the unique problems caused by intervention at the appellate stage.

Thus, a survey of the relevant case law, including that cited by the D.C. Circuit in *Donovan* reveals that although "the question whether intervention may be allowed at the appellate level has not often been passed upon," *In re Grand Jury Investigation*, 587 F.2d at 601, the issue of whether a party that has been allowed to intervene on appeal is precluded from further prosecution of a companion case on the ground of *rest judicata* does not appear to ever have been ruled on. Accordingly, this Court examines those instances when intervention has been allowed on the district court level for persuasive precedent.

The law on the issue of *res judicata* effect on an intervenor at the trial court level supports the defendant's position. *See Alaska v. Andrus*, 429 F. Supp. 958, 964 (D. Alaska 1977) ("[I]t is only [because] the intervenors requested to be allowed into this action that this judgment may be binding on them in the other case."), *aff'd* 591 F.2d 537 (9th Cir. 1979); *Cartolano v. Tyrell*, 421 F. Supp. 526, 530 (N.D. Ill. 1976) ("fact that plaintiff herein entered the previous action as intervenor does not excuse him from the binding effect of that final judgment"). *See also Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) (district court hel dintervenor liable; "it is said to assume the risk that its position will not prevail and that an order adverse to its interests will be entered.") Although the plaintiff goes to great length to distinguish these cases in that they involved intervention at the district court level, in so distinguishing, it does not point to how its status as intervenor at the appellate level differs, for purposes of the preclusive effect of *res judicata*. Consequently, this Court concludes that these cases' propositions are the most applicable.

IV. DISCUSSION

The central issue is whether plaintiff's status as an intervenor at the appellate level in 84-C-472 precludes the further prosecution of this action under the doctrine of *res judicata*.

On March 14, 1988, Judge Cummings for the Seventh Circuit granted the AIW's motion to intervene in 84-C-472. On April 20, 1988, Judge Cummings denied what he construed to be the defendant's motion to reconsider the March decision. The granting of intervenor status to the AIW had no limitations or conditions. Consequently, plaintiff took full advantage of its status: it field full briefs on the merits, supplemented the record wtih factual materials from this action, and argued the merits of the case before the original three-judge panel, and by court order, over the objection of the UAW, argued the case before the Seventh Circuit *en banc*. Moreover, plaintiff was listed as a party in the case's judgment: "[UAW], Plaintiffs-Appellants, and Local 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, TROLS, INC., Defendant-Appellee."

These facts relate that plaintiff received full status as a party in 84-C-472. Plaintiff's own language in requesting that status makes its current position before the Court even more untenable. Plaintiff has been hoisted on its own petard: (1) in plaintiff's first motion to consolidate, it stated this Court must "ultimately determine whether . . . the [defendant's] Fetal Protection Policy [was] lawful under Title VII" and "that ultimate legal determination . . . then would be dispositive of the liability issue in both actions"; (2) plaintiff's March 11, 1988 motion to the Seventh Circuit to intervene in the appeal of 84-C-472 requested intervention "with full rights as parties, including the right to supplement the record . . . and the right to file briefs and be heard on oral argument"; (3) in the same motion to intervene on

appeal, ¶ 11 thereof, plaintiff states, "[g]ranting the AIW's motion for leave to intervene would not only not result in any delay in the instant proceedings but would overall result in economizing the expenditure of judicial resources *in that the ultimate decision of this court would necessarily also be dispositive of the AIW's challenge to the FPP in 85-C-409.*" (emphasis added). *See also* Plaintiff's August 25, 1985 letter in support of AIW Motion to Consolidate p. 3 (this Court's decision "would be dispositive of the liability issue in both actions."). That plaintiff is now arguing that it is not bound by the Seventh Circuit's decision is incredible.

This Court recognized by staying the proceedings in this action that the outcome of 84-C-472 would control plaintiff's case: "the entirety of [the plaintiff's] case hinges upon the determination of whether . . . the Company's [FPP] violates Title VII," and that the UAW's case "presents the same challenge." September 24, 1986 *Odder* staying this action p. 5. This Court also noted in its denial of plaintiff's October 7, 1986 motion to intervene in 84-C-472 that the two cases involve the identical issue and the same defendant. This Court is thoroughly unpersuaded by plaintiff's citation to footnote 1 of the Seventh Circuit's opinion in 84-C-472, 886 F.2d at 874 n.1, and his argument thereon that the Seventh Circuit had allowed the AIW's participation in 84-C-472, in the panel and *en banc*, for the limited purpose of arguing this Court's denial of its motion to intervene. Besides being directly contradicted by each of the statements listed above, this argument fails to recognize that it does not follow from the affirmance of this Court's denial of plaintiff's motion to intervene as untimely—the subject matter of footnote 1—that the Seventh Circuit has somehow reconsidered and vacated its own March 14, 1988 allowance of plaintiff's intervention. Plaintiff states in its December 5, 1989 letter brief that "the Seventh Circuit expressly affirmed this Court's denial of plaintiff's motion wherein plaintiff had sought

under Rule 24 FRCP before this Court to be permitted to intervene in 84-C-472." Plaintiff's December 5, 1989 Letter Brief p. 1. This is true. But plaintiff's conclusion that judgment in 84-C-472 is not *res judicata* as to plaintiff's claims in this action not only does not follow from this fact, it borders on arguing in bad faith. Plaintiff stated in the same letter brief that "while plaintiff was permitted to argue before the Seventh Circuit, that the Seventh Circuit nonetheless really limited the plaintiff's appearance before it to only whether this Court had properly denied plaintiff's motion under [FRCP] 24(a)(2) and the Seventh Circuit simply affirmed this Court's denial of plaintiff's motion to intervene." *Id.* at 3. Examination of the Seventh Circuit's orders and plaintiff's submissions to that Court reveal that that statement is patenly unrue. Such a conclusion that plaintiff's participation was "really limited" has no basis in fact. In the same letter brief plaintiff dismisses its participation in 84-C-472 on appeal as "only for the limited purpose to determine whether or not plaintiff should've been permitted to intervene under [FRCP] 24(a)(2) and the Seventh Circuit simply affirmed this Court's denial of such motion made by plaintiff." *Id.* at 4 (citations omitted). This conclusion is an obvious mischaracterization of the plaintiff's role in that action, as Judge Cummings never indicated in any of his orders that the AIW's participation in 84-C-472 would be for what plaintiff states is a limited purpose. Moreover, such a limited purpose was never requested by plaintiff, nor was its participation in fact so limited.

Plaintiff accuses the defendant of "gamesmanship" and requests sanctions under Rule 11 for its motion to dismiss this action. If any party should be sanctioned in this case, it is plaintiff for its mischaracterizations that it was not indeed a full party in 84-C-472 on appeal. As concluded in part III, the closest precedent is the case law which holds that the doctrine of *res judicata* precludes claims from intervenors after judgment is rendered

in the action in which they intervened. That law, as well as *res judicata* case law in general, holds that a final judgment on the merits of an action bars further claims by the parties based on that same action. *Gray v. Lacke*, 885 F.2d 399, 404-05 (7th Cir. 1989). The defendant has demonstrated a final judgment on the merits in 84-C-472, an identity of the cause of action in this suit, and an identity of parties in 84-C-472 and this action. Accordingly, plaintiff is not allowed a retrial of this case; this Court will dismiss this action under the doctrine of *res judicata*. Plaintiff's request for Rule 11 sanctions against the defendant is denied as specious. Defendant's alternative request in its December 11, 1989 letter for this Court to grant summary judgment is unnecessary.

V. SUMMARY

For the aforementioned reasons, this Court DISMISSES this action as precluded by the principle of *res judicata*.

SO ORDERED this 23rd day of January, 1990, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case Number: 85-C-409

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Plaintiff,

v.

JOHNSON CONTROLS, INC., GLOBE BATTERY DIVISION,
Defendant.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court dismisses this action as precluded by the principle of *res judicata.*

Date January 24, 1990

SOFRON B. NEDILSKY
Clerk

/s/ [Illegible]
(By) Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 85-C-409

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Plaintiff,

vs.

JOHNSON CONTROLS, INC., GLOBE BATTERY DIVISION,
Defendant.

ORDER

[Filed Oct. 12, 1989]

On October 13, 1988, this Court issued an *Order* in the above-captioned action staying the proceedings in this case pending resolution of all appeals in Case No. 84-C-472, which involved both parties to this action. The Seventh Circuit recently issued its *en banc* decision in *UAW, et al. v. Johnson Controls, Inc.*, affirming this Court's grant of summary judgment. *Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, et al. & Local 322, Allied Indus. Workers of America, AFL-CIO v. Johnson Controls*, 84-C-472, slip op. (7th Cir. Sept. 26, 1989) (*en banc*).

The plaintiff has approached the Court with the position that certain issues remain undecided after the Seventh Circuit's decision. It seeks to demonstrate that Johnson Control's fetal protection policy constitutes unlawful sex discrimination regarding those issues.

As the Seventh Circuit has decided the companion case, this Court will now LIFT the stay on the proceedings in this action and OPEN the case for statistical purposes. The Court schedules a status conference for *Tuesday, November 28, 1989 at 9:00 a.m.* in Courtroom 390 of the Federal Building, 517 East Wisconsin Avenue, Milwaukee, Wisconsin, to give the parties an opportunity to state their positions as to what, if any issues remain in this action in light of the Seventh Circuit's decision. If issues remain, the Court will schedule further proceedings at that status conference.

Due to the nature of the companion case, 84-C-472, a possibility exists that the determination in that action will be appealed to the Supreme Court of the United States. The parties should track whether petition for *certiorari* is filed in 84-C-472, as a grant of *certiorari* from the Supreme Court will necessitate a further stay in this case for the same reasons delineated in the October 13, 1988 *Order*.

SO ORDERED this 12th day of October, 1989, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 28, 1989

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL A. KANNE, Circuit Judge

No. 88-1308

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs-Appellants,

and

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Intervening Plaintiff-Appellant,

vs.

JOHNSON CONTROLS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 84 C 472—Robert W. Warren, Judge

AMENDED JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this court filed September 26, 1989. Costs are hereby awarded to the defendant-appellee and against only the plaintiff-appellant, International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 85-C-409

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Plaintiff,

vs.

JOHNSON CONTROLS, INC., GLOBE BATTERY DIVISION,

Defendant.

ORDER

[Filed Oct. 13, 1988]

On March 19, 1985, plaintiff Local 322, Allied Industrial Workers of America, AFL-CIO ("AIW") brought suit against Johnson Controls, Inc., et al., alleging that a fetal protection policy implemented by Johnson Controls at its Milwaukee facility violated Title VII of the Civil Rights Act of 1964. On May 28, 1985, the Court granted AIW leave to file a first amended complaint, which added a second count. The second count sought to vacate as contrary to public policy a labor arbitration award that had been issued on April 22, 1985.

Proceedings in this case, however, were stayed by an Order dated September 26, 1986. In that Order, the Court said that before resolving a summary judgment motion that had been filed by Johnson Controls, the Court would resolve an almost identical motion filed by Johnson Controls in Case No. 84-C-472, a class action suit also challenging Johnson Controls' fetal protection policy.

On January 21, 1988, the Court resolved the summary judgment motion in Case No. 84-C-472, finding that the fetal protection policy at issue did not violate Title VII. The proceedings in this case then continued, with briefing on the summary judgment motion now complete.

The Court has reviewed the briefs submitted by the parties, as well as the history and nature of this case. The Court finds the most judicious course of action in this case is to stay proceedings once again, this time pending resolution of the appeal now pending in Case No. 84-C-472. The Court makes this determination based on the following factors.

First, as stated, Case No. 84-C-472 has been appealed to the United States Court of Appeals for the Seventh Circuit. As made clear by the Court's summary judgment determination in that case, the Seventh Circuit has not previously reviewed a Title VII action involving the health of the fetus. Indeed, only three jurisdictions have reviewed such actions.

Second, on March 14, 1988, the Seventh Circuit granted the AIW's motion for leave to intervene in the appeal of Case No. 84-C-472.

Third, as recognized by the AIW, the Seventh Circuit's resolution of that case will control the resolution of the Title VII claim now before this Court. But the framework of the Seventh Circuit's analysis also will bear on this Court's resolution of the other challenges to the fetal protection policy.

Fourth, while the Court recognizes that this case has been delayed once already, a second stay may prove the most advantageous use of time and resources in the long-run. It does neither party any good to receive a resolution of the case at hand if a second appeal will have to be fought on the same issues now pending before the appellate court.

Accordingly, based on this Court's inherent authority to control the disposition of its docket, *see Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936), the Court hereby STAYS proceedings in this case pending resolution of all appeals in Case No. 84-C-472, which now involves both parties of this action. This case also is hereby CLOSED for statistical purposes. Either party may petition to reopen the case, when appropriate, by way of a letter to the Court.

SO ORDERED this 13th day of October, 1988, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 85-C-409

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Plaintiff,

vs.

JOHNSON CONTROLS, INC., GLOBE BATTERY DIVISION,

Defendant.

ORDER

[Filed Jan. 28, 1988]

In an *Order* dated September 24, 1986, the Court stayed proceedings in the above-named case pending resolution of *International Union v. Johnson Controls, Inc.*, 84-C-472. That case was resolved January 21, 1988. January 22, 1988, plaintiff in this case moved to reopen. Accordingly, the Court hereby GRANTS the motion to reopen. The Court will hold a status conference on *Monday, February 22, 1988 at 9:45 a.m.* in Courtroom 390 of the Federal Building, 517 East Wisconsin Avenue, Milwaukee, Wisconsin. The Court further ORDERS that the parties attend the status conference having read the *Decision and Order* disposing of Case No. 84-C-472.

SO ORDERED this 28th day of January, 1988, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 84-C-472

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,

Plaintiffs,

vs.

JOHNSON CONTROLS, INC.,

Defendant.

ORDER

[Filed Jan. 21, 1988]

Local 322, Allied Industrial Workers of America, AFL-CIO has filed a motion to intervene or to be permitted to file an amicus brief. Local 322 is a plaintiff in a case involving the identical issue and the same defendant as the above-captioned case. This Court stayed the case in which Local 322 is a plaintiff until the motions in the above-captioned case are resolved. Local 322 wishes to file a brief setting forth its arguments as to why the fetal protection policy violates Title VII. The Court has reviewed the filings by Local 322 and Johnson controls and DENIES the motion to intervene or file an amicus brief.

First, the motion to intervene or file an amicus brief could and should have been filed during the summary judgment briefing schedule. The Local has not stated that it was unaware that a summary judgment motion was filed.

Further, this Court seriously doubts what additional "new" arguments could have been made by the Local. The plaintiffs in the present case thoroughly addressed the issues and evidence. In this case there have been two responsive briefs filed by the plaintiffs in this action. The matter has been fully briefed by both parties. Further briefing would not be of assistance to the Court in resolving the motion.

The Court also accepts for purposes of the pending summary judgment motion the supplemental brief and affidavit of Michael Silverstein submitted by plaintiffs, and the Court accepts defendant's supplemental reply brief.

SO ORDERED this 21st day of January, 1988, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 85-C-0409

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Plaintiff,

vs.

JOHNSON CONTROLS, INC., GLOBE BATTERY DIVISION,

Defendant.

ORDER

[Filed Sep. 24, 1986]

Presently pending in the above-entitled action are defendant's motion to dismiss Count II of plaintiff's amended complaint; defendant's motion for summary judgment; plaintiff's motion to either consolidate this action with Case Number 84-C-0472, to stay proceedings in the present case pending resolution of Case Number 84-C-0472 or for an extension of thirty days to respond to defendant's motion for summary judgment.

BACKGROUND

On March 19, 1985, plaintiff Local 322, Allied Industrial Workers of America, AFL-CIO ("the Union"), commenced this action against defendant Johnson Controls, Inc. ("the Company"), alleging that the Company's implementation and operation of its Fetal Protection Policy ("FPP") at its Battery Division facility in Milwaukee,

Wisconsin, constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). The Company's FPP generally prohibits women who are capable of bearing children from working in jobs where there is a likelihood that their blood lead levels will rise above 30 micrograms per 100 millileters of whole blood. The Company timely answered the Union's complaint pleading several affirmative defenses.

In its *Memorandum And Order* of May 28, 1985, the Court granted the Union's motion to amend its complaint. The Union's amended complaint adds a claim (Count II) pursuant to § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 ("LMRA"), seeking to vacate the arbitration award upholding the Company's FPP issued by Arbitrator Robert J. Mueller on April 22, 1985. Further, in its June 10, 1985, letter to counsel, the Court stated that it would construe the Company's brief of May 29, 1985, in opposition to the Union's motion to amend granted by the *Memorandum And Order* of May 28, 1985, as a brief in support of a motion to dismiss Count II of the amended complaint.

As a final background matter, it should be noted that Count I in the present case and the cause of action in Case No. 84-C-0472, presently pending in this Court, involve the same issue, specifically the legality under Title VII of the Company's FPP. In its *Order* of November 25, 1985, the Court recognized that these two cases present the same issue but at that time denied the Union's motion for consolidation. In doing so, the Court recognized that it lacked sufficient information about the factual background of the two cases to determine whether consolidation was warranted. Further, the Court determined that it would be more appropriate to consider consolidating the two cases following the completion of discovery and the resolution of any dispositive motions.

DISCUSSION

I.

Count II of plaintiff's amended complaint reads as follows:

> The arbitration award referred to above is in manifest disregard of law and is inconsistent with and contrary to public policy as expressed in Title VII of the Civil Rights Act of 1964 and the Occupational Safety and Health Act, and particularly the OSHA legal standard as set forth in 29 C.F.R. § 1910, *et seq.*

In its motion to dismiss Count II, the Company argues, *inter alia*, that the arbitrator's award is consistent with public policy since the Company's FPP violates neither Title VII nor the Occupational Safety and Health Act.

In resolving a motion to dismiss, the Court must accept as true all of the allegations in the amended complaint. *Greene v. Finley*, 749 F.2d 467, 468 (7th Cir. 1984). Indeed, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 45-46 (1957). The complaint's allegations must be construed in favor of the party opposing the motion. *Westland v. Sero of New Haven, Inc.*, 601 F. Supp. 163, 166 (N.D. Ill. 1985).

In the present case, the plaintiff claims in Count II that the subject arbitration award upholding the Company's FPP is inconsistent with and contrary to public policy. This Court may review an arbitration award on the basis of public policy considerations. *Local No. P-1236, Etc. v. Jones Dairy Farm*, 680 F.2d 1142, 1144 (7th Cir. 1982). Further, the collective bargaining process cannot abrogate an employer's rights under Title VII. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-

50 (1973). Thus, if plaintiff prevails on its Count I-Title VII cause of action, it may prevail on its Count II-LMRA cause of action.

In recognition of the aforementioned standards employed in resolving a motion to dismiss, the Court is unable to conclude that plaintiff can prove no set of facts in support of Count II which would entitle it to relief. Specifically, if the Union establishes that the Company's FPP violates Title VII, then it may be able to establish that the arbitration award upholding the Company's FPP is inconsistent with and contrary to public policy. Accordingly, the defendant's motion to dismiss Count II of the amended complaint is DENIED.

II.

The Company moves for summary judgment in its favor as to the entirety of the Union's case. In support, the Company argues that the record before this Court establishes as a matter of law that the Company's FPP is lawful under Title VII and that the subject arbitration award is consistent with public policy. In response, the Union requests that this Court either consolidate the present case with Case Number 84-C-0472 or stay the proceedings in the present case until the validity of the Company's FPP has been resolved in Case Number 84-C-0472. In the alternative, the Union requests an additional 30 days in which to respond to the Company's motion.

Both parties agree that the entirety of plaintiff's case hinges upon the determination of whether or not the Company's FPP violates Title VII. Case Number 84-C-0472 presents the same challenge to the Company's FPP under Title VII, although in that case the primary plaintiff is the United Auto Workers Union ("UAW"). The plaintiff in the present case has admittedly foregone conducting extensive discovery and retaining experts in order to save expenses since such efforts were already being

made by the UAW in prosecuting Case Number 84-C-0472. Indeed, based on a review of the applicable files and on counsels' representations, the Court is convinced that the UAW in Case Number 84-C-0472 is prosecuting that case with much greater zeal, and resultingly at much greater expense, than the plaintiff in the present case. The respective records before the Court in the two actions reflect this disparate prosecution effort.

Whether the Company's FPP violates Title VII presents an issue of great import, both to the plaintiff Unions and the irrespective members as well as to society at large. To ensure that it renders substantial justice, the Court may in its sound discretion stay the proceedings in one suit to abide the proceedings in another. *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); 1 J. Moore, *Moore's Federal Practice* ¶ 0.60 [6] (2d ed. 1948). In exercising this discretion, the Court must weigh the competing interests. 299 U.S. at 255. Here, since the plaintiff seeks the stay and the defendant is the same in both cases, neither party will suffer hardship or inequity if the present action is stayed pending resolution of the dispositive motions challenging the Title VII claim in Case Number 84-C-0472. Further, the fact that the issues presented by the two cases are of "public moment" weighs in favor of staying Case Number 85-C-0409. *Id.* at 256.

In the interests of justice, the Court stays the proceedings in the present case, Case Number 85-C-0409, pending resolution of the dispositive motions in Case Number 84-C-0472. Depending on the resolution of the motions in Case Number 84-C-0472, further proceedings in the present case will be scheduled as appropriate.

SUMMARY

The Court hereby DENIES the defendant's motion to dismiss Count II of the amended complaint. Further, the Court STAYS the proceedings in the present action

pending resolution of the dispositive motions in Case Number 84-C-0472.

Finally, IT IS ORDERED that, because there appears to be no reason at this time to maintain the file as an open one, for statistical purposes the Clerk of Court is instructed to submit a JS-6 form to the Administrative Office, thereby closing the case for statistical purposes.

IT IS FURTHER ORDERED that nothing in this Order shall be considered a dismissal or disposition of this matter, and either party may reopen the case at any time by advising the Court and opposing counsel in writing that the case is ready to proceed.

SO ORDERED this 24th day of September, 1986 at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 84-C-472

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,

Plaintiffs,

vs.

JOHNSON CONTROLS, INC.,

Defendant.

Case No. 85-C-409

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Plaintiffs,

vs.

JOHNSON CONTROLS INC., GLOBE BATTERY DIVISION,

Defendant.

ORDER

[Filed Nov. 25, 1985]

Local 322, Allied Industrial Workers of America, the plaintiff in case number 85-C-409, has filed a motion to consolidate that case with case number 84-C-472 now pending before this Court. Local 322 wishes to consolidate these cases only for purposes of a joint trial on the issue of liabiilty. Johnson Controls, Inc., is the defendant

in both actions and suggests that the motion for consolidation be held in abeyance until the completion of discovery and the resolution of expected motions for summary judgment. Until that time, Johnson Controls contends, the Court would have inadequate information upon which to base its decision on the motion to consolidate.

Both cases involve the legality under Title VII, 42 U.S.C. § 2000e *et seq.*, of Johnson Controls' Fetal Protection Policy. Undoubtedly, certain legal and factual issues will be common to both cases should they proceed to trial. At some point in the future it may be appropriate to consolidate these actions.

However, the Court agrees with the defendant that consolidation at this point in the litigation of these cases is not warranted. Local 322 has already challenged the defendant's Fetal Protection Policy in an arbitration proceeding, and that decision may be used as evidence in the pending litigation. Count II of Local 322's amended complaint pertains to its effort to vacate the arbitration award and is the subject of the defendant's motion to dismiss that count. An additional motion is expected to be filed by the defendant for summary judgment in case number 84-C-472. In short, there is no way of determining at this point how much if any of Local 322's action will remain for trial.

Apart from the possible dismissal of any or all of the claims in either of these cases, the parties have not disclosed to the Court very much factual information in their briefs on this motion. In fact, two of the "briefs" received were in the form of relatively short letters. The Court does not have enough information about the factual background of these cases or the issues to be presented in order to make a proper finding under Rule 42(a), Federal Rules of Civil Procedure.

Rather than hold the motion for consolidation in abeyance, the Court will deny it at this time with the under-

standing that Local 322 may renew it once discovery has been completed and the dispositive motions resolved. At that time, the parties may present to the Court more thorough briefs addressing both the factual and legal issues presented in each case.

The motion of Local 322 for consolidation of case numbers 84-C-472 and 85-C-409 is therefore DENIED.

SO ORDERED this 25th day of November, 1985, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 85-C-409

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Plaintiff,

vs.

JOHNSON CONTROLS, INC., GLOBE BATTERY DIVISION,
Defendant.

MEMORANDUM AND ORDER

[Filed May 28, 1985]

This action was initiated on March 19, 1985, when the plaintiff-union filed its complaint challenging the defendant-employer's implementation of a certain Fetal Protection Policy ("FPP") as violative of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* The defendant interposed a timely answer on April 9, 1985, denying, among other things, the principal allegation of sex discrimination incorporated in the complaint and raising several affirmative defenses—among them, that its FPP is premised on a bona file occupational qualification for employment in certain positions and is further required by business necessity.

On April 22, 1985, an arbitrator of the Federal Mediation and Conciliation Service issued an award dismissing a certain grievance filed by one of the defendant's employees, principally upon the grounds that business and medical needs do, in fact, support the creation and implementation of the FPP challenged by the present law-

suit. By its motion of May 10, 1985, the plaintiff seeks to amend its complaint to add an additional count, challenging the arbitration award as contrary to the law and inconsistent with the public policy expressed in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Occupational Safety and Health Act, 29 U.S.C. § 654 *et seq.* To date, the defendants have not signaled any opposition to the pending motion by filing an opposing brief.

As both parties to this action surely recognize, Rule 15(a) of the Federal Rules of Civil Procedure provides that once a responsive pleading is served, "a party may amend its pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The unmistakable purpose of the rule is to assist the disposition of litigation on its merits, rather than permitting the pleadings to become ends in themselves. *Summit Office Park, Inc. v. United States Steel Corporation*, 639 F.2d 1278, 1284 (5th Cir. 1981). In furtherance of this legitimate goal, Rule 15(d) empowers the trial judge to permit the filing and service of "a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

Normally, federal courts favor liberality in permitting amendments to pleadings, and when justice so requires, the matter is committed to the trial judge's broad range of discretion. *Hayden v. Ford Motor Company*, 497 F.2d 1292, 1294 (6th Cir. 1974). The admonition that leave to amend pleadings should be freely given was most clearly underscored by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 182 (1962), as follows:

> . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to

> test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court but outright refusal to grant the leave without an yjusifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the federal rules.

See also Freeman v. Continental Gin Company, 381 F.2d 459, 461 (5th Cir.), *rehearing denied*, 384 F.2d 365, 370 (5th Cir. 1967) ("circumstances and terms upon which . . . leave is to be 'freely given' [are] committed to the informed, careful judgment and discretion of the trial judge as he superintends the development of a cause toward its ultimate disposition").

Based on the procedural and substantive record compiled to date in the present case, the Court concludes that leave to amend the complaint should be granted. As indicated above, the action was initiated only two months ago and an answer filed shortly thereafter. To date, the Court has established no deadlines for the completion of discovery and has selected no dates for trial. Under these circumstances, the Court cannot identify any prejudice that would accrue to the defendant if the proposed amendment were allowed.

Most significantly, the Court feels strongly that the paramount interest in the complete adjudication of all claims between the parties would be promoted significantly if the present request were granted. In this context, it is abundantly clear that the legal and factual issues raised by the challenge to the arbitration award

under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, are substantially similar if not identical to those related to the attack on the FPP under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

Accordingly, for the reasons set forth above, the Court hereby GRANTS the plaintiff's motion to amend its complaint, pursuant to Rule 15(a)&(d) of the Federal Rules of Civil Procedure.

SO ORDERED this 28th day of May, 1985, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
United States District Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Case No. 85-C-0409

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Plaintiff,

vs.

JOHNSON CONTROLS, INC., GLOBE BATTERY DIVISION,
Defendant.

FIRST AMENDED COMPLAINT

Jurisdiction

1. The jurisdiction of this Court as to Count I is invoked pursuant to 42 U.S.C. § 2000e-5(f) and the action is one arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

The jurisdiction of this Court as to Count II is invoked pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 in that it is an action to set aside an arbitration award that is alleged to be inconsistent with and contrary to public policy.

Parties

2. The plaintiff, Local 322, Allied Industrial Workers of America, AFL-CIO (Union) is a labor organization engaged in an industry affecting commerce within the

meaning of 42 U.S.C. §§ 2000e (d) and (e) and exists for the purpose of exclusively representing certain employees employed by Johnson Controls, Inc., Globe Battery Division (hereinafter Company) at its Milwaukee facility relative to wages, hours, and other terms and conditions of their employment. The Union has more than 25 members, and at all times material represented employees in an industry affecting commerce within the meaning of 29 U.S.C. § 185.

At times material herein the Union and Company were parties to a labor contract, which labor contract is described more fully below in Paragraph 4.

The Union's offices are located at 5101 N. 37th St., Milwaukee, WI 53209.

3. The defendant Company is incorporated and exists under the laws of the State of Wisconsin. The Company's corporate headquarters are located at 5757 N. Green Bay Avenue, Glendale, WI 53209, and at all times material, was an employer within the meaning of 29 U.S.C. § 185.

The facility at which the Union is the exclusive bargaining representative of certain of the Company's employees is located at 900 E. Keefe, Milwaukee, WI 53212.

Facts

4. The Union and Company on November 21, 1980, executed a labor contract, which labor contract was to remain in effect until at least November 9, 1983.

5. Prior to and at the time said labor contract was entered into, there was no distinction made as between male and female employees covered under said labor contract in regard to seniority rights, nor was there any distinction made as between females who were capable of child bearing and those who were not in regard to the application of seniority rights and benefits under said labor contract.

6. Sometime in January, 1983, the Company first presented the Union with a proposed Fetal Protection Policy the Company had formulated and, on or about March 1, 1983, the Company unilaterally and over the Union's objection, implemented and put into effect such Fetal Protection Policy at its facility in Milwaukee referred to in Paragraph 3 above.

The Company has continued, and continues at the present time, to enforce and apply said Fetal Protection Policy to its female employees at said facility.

7. The Company is and has been at all times mentioned herein, subject to the provisions of the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 654 (a)(1) and is and has been subject to the OSHA lead stnadard as provided in 29 C.F.R. § 1910, *et seq.*, and, in particular, 29 C.F.R. § 1910.1025(k)(2)(vii) of the OSHA lead standard provides:

> "Where an employer, although not required by this section to do so, removes an employee from exposure to lead or otherwise places limitations on an employee due to effects of lead exposure in the employee's medical condition, the employer shall provide medical removal protection benefits to the employee equal to that required by paragraph (k)(2)(i) of this section. . . ."

8. Prior to the Company's unilateral introduction of the Fetal Protection Policy on March 1, 1983, and since at least the promulgation of the lead standard by OSHA, the Company had applied the lead standard as provided for in 29 C.F.R. § 1910.1025, *et seq.*, to all its employees, both male and female.

9. Since the Company has introduced its Fetal Protection Policy, the Company has unilaterally divided the jobs covered under the labor contract referred to in Paragraph 4 into two categories, i.e., those that it deemed were acceptable and those that it deemed were

unacceptable as to female employees of child bearing capabilities only.

An unacceptable job under the Company's Fetal Protection Policy is any job where within the prior twelve (12) month period there had been a single air lead reading in excess of 30 micrograms of lead per cubic meter of air *or* where any incumbent employee on the job within the prior twelve (12) month period had had a single blood level reading in excess of 30 micrograms per 100 grams of blood.

10. As a result of the Company's unilateral implementation of the Fetal Protection Policy, female employee members of the Union of child bearing capabilities as a class have been, and are being, denied job opportunities that their seniority rights would have otherwise entitled them to under the labor contract and, even though these female employees would not have been barred from such jobs under the OSHA developed lead standard, 29 C.F.R. § 1910.1025, *et seq.*, and even though the female employees' own blood levels were below the 30 micrograms per 100 grams of blood level.

11. Several female employee members of the Union who were denied their rights to transfer to higher paying jobs because of the Fetal Protection Policy, filed grievances and the Union did thereafter, on their behalf, pursue such grievances to arbitration pursuant to the provisions provided for in the labor contract referred to above in Paragraph 4.

12. Prior to the passage of Title VII of the Civil Rights Act of 1964, the Company had not employed female employees in production positions in the bargaining unit represented by the Union. That the employment of females in these positions by the Company was only the result of the prohibition of dis-crimination based upon sex as was required by Title VII of the Civil Rights Act of 1964.

13. That in 1977, the Company, by its representatives, then claimed and provided to OSHA data to support that all of its employees, both male and female, would be safe working even in work areas where the air lead levels were at least no higher than 200 micrograms of lead per cubic meter of air and that, therefore, it was unnecessary for OSHA to require in any lead standard air lead levels to be reduced below the 200 micrograms of lead per cubic meter of air level.

14. That simultaneously with the unilateral implementation of its Fetal Protection Policy, the Company has implemented discriminatory hiring practices that discriminate against female applicants for employment and denies to female applicants the same equal job opportunities for employment as are afforded to male applicants for employment.

15. That the Union, as the exclusive bargaining representative of all the employees covered under the labor contract referred to above in Paragraph 4, is impressed with the legal duty to fairly represent all such employees and, without discrimination, in regard to the sex of the employees it is legally bound to represent. That the Company's present hiring practices in affording greater employment opportunities to male employees than to female employees undermines the Union's continuing ability and effectiveness to fairly continue to represent female employees in that the Union's membership makeup, as between male and female members, is a direct resultant of the Company's hiring practices and as the Company continues to afford preferential hiring opportunities to males than it does to females, so too, will the Union's membership become increasingly made up of more males than females.

16. That on April 22, 1985, the arbitrator issued his Award (a copy of which is attached hereto and made a part hereof as Exhibit A) and which was in response to the grievances of those female employees referred to above in Paragraph 11.

Count I

17. By its Fetal Protection Policy and attendant hiring practices, the Company has inflicted, and will continue to inflict, irreparable injury on the Union and its membership in violation of Title VII and, particularly those female employees who, since March 1, 1983, have been denied job rights and benefits otherwise owed to them under the labor contract with the resultant loss in pay, as well as other monetary benefits, these individual female employees have since incurred as a direct result of the Company's continued application of said Fetal Protection Policy.

18. That on or about September 17, 1984, the Union filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging the Company was engaging in sex discrimination. (A copy of said charge is attached hereto as Exhibit B.) And that on March 12, 1985, the EEOC caused to be issued a Notice of Right to Sue. (A copy of said Notice of Right to Sue is attached hereto as Exhibit C.)

Count II

19. The arbitration award referred to above is in manifest disregard of law and is inconsistent with and contrary to public policy as expressed in Title VII of the Civil Rights Act of 1964 and the Occupational Safety and Health Act, and particularly the OSHA legal standard as set forth in 29 C.F.R. § 1910, *et seq.*

Prayer for Relief

WHEREFORE, Plaintiff prays that this Court grant the following relief:

A. That the Company be enjoined from giving any further effect to the Fetal Protection Policy;

B. That the Company be required to make whole any female employee who, since March 1, 1983, has been de-

nied employment opportunities and benefits otherwise available but were denied due to the Company's application of its Fetal Protection Policy;

C. That the arbitration award that issued April 22, 1985, be set aside and vacated;

D. That the Court award the Plaintiff reasonable attorneys' fees; and

E. That the Court grant such other and further relief as the Court may deem just and proper.

Dated at Milwaukee, Wisconsin, this 8th day of May, 1985.

/s/ Kenneth R. Loebel
KENNETH R. LOEBEL
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EXHIBIT A

FEDERAL MEDIATION AND CONCILIATION SERVICE

BEFORE THE ARBITRATOR

IN THE MATTER OF THE ARBITRATION OF A DISPUTE BETWEEN

JOHNSON CONTROLS, INC., GLOBE BATTERY DIVISION,

and

ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 322, AFL-CIO

AWARD AND OPINION

Case No.	84K/01923
Grievant	Catherine Voeltner
Hearing Dates	July 19, 1984 August 31, 1984 November 16, 1984
Appearances:	
For the Employer	Foley & Lardner, Attorneys at Law, by MR. STANLEY S. JASPAN
For the Union	Habush, Habush & Davis, S.C., Attorneys at Law, by MR. KENNETH R. LOEBEL
Arbitrator	MR. ROBERT J. MUELLER
Date of Award	April 22, 1985

BACKGROUND

The above-entitled matter came on for hearing before the undersigned who was selected as the sole arbitrator to hear the dispute from a panel furnished by the Federal Mediation and Conciliation Service. The parties were present at the hearing and were afforded full opportunity to present such evidence, testimony and arguments as they deemed relevant. Post-hearing briefs were filed by the parties and exchanged through the arbitrator.

FACTS

At all times material to this dispute, the Company and Union were parties to a labor contract covering the period from November 21, 1980 through November 9, 1983. The Company produces several types of specialty batteries at its Milwaukee battery plant facility. As is the case in most if not all battery plants, lead is the principal active material that is used in the production of batteries. The use of lead in the production of batteries therefore resulted in exposure of employees to lead dust and lead fumes. It was generally known that employees exposed to excessive amounts of lead dust or lead fumes can suffer adverse affects such as heme-synthesis (the making of hemoglobin) and damage to the renal system and to the central and peripheral nervous system.

Prior to the issuance of OSHA rules covering the use and control of lead and exposure to employees in the work place, the Company had installed and instituted numerous engineering controls, process modifications, exhause ventilation, central vacuum systems, make-up air units, and instituted rules and procedures involving respirator use, employee clothing and shoes, personal hygiene practices and numerous improved work practices. In addition, the Company for numerous years engaged in biological monitoring of employees and the work place, medical surveillance programs, air sampling and mon-

itoring of air lead conditions, and testing and monitoring of blood lead levels in employees. The Employer also engaged in transfer of employees from high lead exposure jobs to jobs where exposure to lead was less at various times upon advice of the plant physician.

Prior to approximately November 1978, the only OSHA standard in effect that regulated lead use and exposure, required that employers implement engineering controls that would reduce employee exposure to air born lead below 200 micrograms per cubic meter of air. In November 1978, a detailed and extensive OSHA lead standard went into effect. For the first time, the standard provided for mandatory biological monitoring of blood lead levels of employees and provided for standards by which employees are to be transferred and for the maintenance of wage levels for a certain period of time when transferred from a higher paying job to a lower paying job because of lead exposure. The OSHA standards specified blood lead levels where employees were requird to be temporarily removed from a job or area in which they had been working. The OSHA standards were phased in over a five-year period with the allowable blood lead levels being reduced at various steps until the final "action level" under which employee removal is to occur reached that point of 50 micrograms per 100 milileters of whole blood.

The undisputed evidence revealed that prior to and during negotiations which lead to the current three-year labor agreement, neither party proposed nor discussed any form of fetal protection policy or program.

At some point after the beginning of the current labor agreement in 1980, the Employer began considering the advisability of formulating and implementing some form of fetal protection program. For some period of time the Company had been conducting educational and counseling programs with female employees capable of bearing children and had been utilizing a volunteer type pro-

gram to persuade female employees capable of bearing children to refrain from working in areas where air leads were high and where employees working in such areas averaged relatively high blood lead levels.

Sometime during the latter part of 1982 and early part of 1983, the Company adopted a fetal protection policy at the guidance and urging of its medical consultant on such matter. The Union was advised of the Company's intent to implement such policy in early January of 1983. Such policy was implemented at the Milwaukee facility in March of 1983.

The policy applied only to females who had child bearing capabilities. Any employee who furnished medical documentation to the Company that they did not have child bearing capabilities, was excused from coverage of the policy. Of the approximately 150 female employees employed by the Company at that time, approximately 44 or 45 were impacted by the fetal protection policy (hereinafter referred to as FPP).

The FPP essentially divides all bargaining unit jobs into two categories of acceptable or non-acceptable jobs. An acceptable job for a female of child bearing capabilities is any work station where the blood lead level readings of the incumbents over the past year are less than 30 micrograms per 100 grams of blood and air lead readings are less than 30 micrograms of lead per cubic meter of air. The plan further contained a grandfather clause which provided that any incumbent employee subject to the policy who was working in an unacceptable job at the time the policy was implemented, but who nevertheless maintained a blood lead reading of less than 30 micrograms of lead per 100 grams of blood, could remain in such job. The plan also provided for medical removal protection benefits which provided that employees removed from a job under the FPP would not suffer loss of earnings. MRP benefits were to continue until such employee no longer had child bearing capabilities

and failed to take advantage of a bid opportunity into a higher paying job or if she would fail to take advantage of a bid opportunity into an acceptable job at the same or higher rate. The 18-month limitation was not applicable to the MRP protection under the plan.

The grievant, Catherine Voeltner, has been an employee of some five years. She is 27 years of age and has one child. In 1983, sometime after implementation of the FPP, Voeltner bid on a posted panel-tack operator job in the Fabrication Department. The Company denied her bid on the basis of FPP. The panel-tack operator job had been defined as "unacceptable" under the FPP on the basis of records of the work station and employees who had worked on such job during the prior year.

Under date of August 9, 1983, grievance number 7 was filed by employee Voeltner, which grievance alleges as follows:

> "COMPLAINT Employe won the bid as a panel-tack operator on third shift but was refused the job because of the fetal protection policy and denied the opportunity to utilize her seniority and also to improve her status with the company.
>
> "Remedy Requested Move employe to the job in which she bid on and won with back-pay."

ISSUE

The Union proposed the statement of the issue to be as follows:

> "Did the Company violate the labor contract introduced as Joint Exhibit 1, particularly Article 3 and 4 thereof, dealing with seniority and transfer rights, when the Company unilaterally put into effect during the term of said labor contract what is referred to as its Fetal Protection Policy. If so, what is the appropriate remedy?"

The Union worded the issue so as to include all other employees similarly situated. They requested that the matter be treated as a class grievance and that any issued remedy be inclusive of the class.

The Company objected to it being treated as a class grievance and argued that the decision of the arbitrator should be limited to resolution of the written grievance filed by employee Catherine Voeltner and entered into evidence as Joint Exhibit No. 2. The Employer proposed the issue be stated as follows:

> "Did the Company violate the collective bargaining agreement by refusing the bid of Cathy Voeltner into the panel tech operator position based upon its Fetal Protection Policy. If so, what is the appropriate remedy?"

Upon being unable to reach agreement on the scope or wording of the issue, both parties agreed that the arbitrator be empowered to determine the issue or issues to be determined. The arbitrator would thus propose that the issues to be resolved are as follows:

1. Did the Company violate the Collective Bargaining Agreement by refusing the bid of Cathy Voeltner to the panel tech operator position based upon its fetal protection policy?
2. If Issue No. 1 is answered "yes," then what is the appropriate remedy as to said grievance?
3. If Issue No. 1 is answered "yes," what remedy, if any, should issue concerning all other female employees similarly situated?

DISCUSSION

The arbitrator will first examine the evidence and argument of the Company for implementing the fetal protection policy and Secondly, the Company's argument of why it does not believe the implementation of such

policy violates the grievant's rights under the Collective Bargaining Agreement. The arbitrator will then examine and evaluate the evidence and Union's arguments of why it believes that the Company's implementation of the fetal protection policy violates the contractual rights of impacted employees and specifically, those rights of the grievant in the specific grievance presented.

The Company argued in the first instance and presented documentary evidence and testimony intended to support their position that a fetal protection policy was necessary to protect the safety and health of its employees and particularly that of unborn children. They stated in their brief as follows:

> "Young children have a much greater sensitivity to lead than do adults. Levels of lead exposure safe for adults are considered unsafe for children. Not only do children generally react to toxic substances in a more pronounced fashion and at lower dosages than do adults, but young children, unlike adults, have no barrier to lead entering the brain directly from the blood and thereby permanently affecting the central nervous system. Blood lead levels of 50 micrograms per 100 milliliters of whole blood are generally not considered dangerous for adults, especially if there are no other indications of ill effects; in young children, the Center for Disease Control has defined blood lead levels above 30 micrograms as potentially dangerous and has now proposed reducing that level even further, to 25 micrograms. Recent proposals by the Environmental Protection Agency to eliminate lead in gasoline sold in the United States are specifically premised on the concern for exposure of young children (and pregnant women) to lead in the air. (Tr. II: 45-46; Tr. III: 14-23; Co. Ex. 49)

> "The fetus is exposed to the same blood lead level as its mother; there is no placental barrier preventing the lead in the mother's blood from passing to the child. Moreover, the sensitivity of the unborn child, in utero, is medically judged to be at least as great as that of young children. Thus, if a pregnant employee has a blood level in excess of 30 micrograms, so will the fetus. Further, during the early stages of pregnancy, perhaps even before a woman knows she is pregnant, excessive lead exposure to the fetus can cause permanent damage to the developing central nervous system. (Tr. III: 22-27, 100-101, 114-115)"

While the Company had been conducting educational and counseling programs designed to encourage females with child bearing capabilies to not work in high lead areas, they point out that at the same time medical literature increasingly demonstrated the potentially serious and permanent nature of the dangers in lead in young children and in the fetus at relatively low blood lead levels.

The Company also argued that the fetal protection policy is consistent with the Occupational Safety and Health Act and its lead standard. The Company addressed such matter in its brief as follows:

> "While the OSHA lead standard appendix states that there is potential danger to the male reproductive system from excessive exposure to lead, the preamble specifically differentiates the special danger to the fetus at lower levels, making specific reference to the 30 microgram level. (Co. Ex. 7, pp. 52959-52960) Suggestions that male employees expecting to become parents also keep their blood lead levels below 30 micrograms are unsupported by the references contained in either the preamble or the appendix. Further, both medical experts testifying at the hearing agreed that the level at which such danger ap-

parently occurs for the male reproductive system is no lower than that level at which concern arises for the other systems of the adult—both male and female. More importantly, they both testified that there is no evidence that this danger occurs at the same relatively low level at which permanent injury can be done to the central nervous system of the developing fetus. Of further significance is the fact that the blood lead level of an adult is less important than the measurable effects of the lead. With the fetus, on the other hand, the blood lead level is much more significant because of the direct passage of lead from the blood to the brain and because lead effects generally cannot even be measured in the fetus; only blood lead levels, based on the mother's blood lead, are available. Both experts were of the opinion that the biological monitoring program and transfer procedures used by the Company were fully sufficient to protect both male and female employees, including the male reproductive system. Both experts were also of the opinion that the Fetal Protection Policy was necessary to protect the health of the fetus. (Tr. III: 10-33, 74-79, 100-125)"

Finally, the Company argued that courts and arbitrators both have approved fetal protection policies and have found them not to be discriminatory on the basis of sex. Finally.. the Company argues that the fetal protection policy as applied to grievant Voeltner's bid to the paneltack operator position does not violate any contractual rights of the grievant under the labor contract. They argue that the implementation of the FPP is in accord with the rights of the Employer to take such action within the rights of management as contemplated in Article IX, Section 8 of the Collective Bargaining Agreement. They state in their brief that,

"Article IX, Section 8 of the collective bargaining agreement provides in part as follows:

> " 'The management of the business and the direction of its working force, including but not limited to, the right to direct, plan and control plant operations . . ., to hire, promote or transfer employees . . ., to relieve employees because of lack of work or other legitimate reasons, to make reasonable plant rules and regulations . . . are exclusively the rights of the Company subject to the other provisions of this contract.' (Jt. Ex. 1, p. 73)

The Fetal Protection Policy, based as it is upon sound medical judgment, certainly constitutes a reasonable rule or regulation involving the hiring, promotion and transfer of employees and, in some instances, results in relieving employees for very legitimate reasons.

"More specifically, in Article VIII of the collective bargaining agreement, dealing with safety and health, section 11 specifically addresses the transfer of employees because of lead exposure. (Jt. Ex. 1, p. 70) This section refers to transfers because of blood lead levels; the entire Fetal Protection Policy is directed to controlling the blood lead levels of those employees capable of bearing children. In fact, the Company has for years exercised its right, duty and obligation to transfer and place employees based upon physicians' judgments concerning lead exposures, whatever the blood leads of the individual might have been; the OSHA lead standard specifically provides for transfer of employees based upon a physician's judgment. (Tr. II: 39-40; 182-186; Co. Exs. 23, 42) Recognition of the potential hazards of excessive lead exposure, even before OSHA imposed any restrictions on employee placement, led the Company and the Union to accept and rely upon physicians' judgments. The language in the contract, as applied over the years, reflects this deference to medical opinion.

Section 1 of that same Article VIII imposes on the Company the affirmative obligation to 'continue to make necessary provisions for the safety and health of its employees at the plant during the hours of their employment.' (Jt. Ex. 1, p. 67) The Fetal Protection Policy is part of the Company's effort in this regard. . . .

"The Union argues that, notwithstanding the overwhelming and unchallenged medical evidence in support of the Fetal Protection Policy and the clear intent of the parties, as expressed in the collective bargaining agreement, to protect employee health and defer to medical opinion, seniority, as expressed in Articles III and IV of the collective bargaining agreement, must reign supreme no matter who might suffer. This position is absurd. Safety and health supercede seniority; those provisions of the contract already cited make that clear. Moreover, both ARticle III and Article IV refer to the need for employees to satisfy the basic qualifications for a position in order to be allowed a placement in the position. (Tr. I: 76) Certainly, in establishing qualifications due regard must be given to health and safety.

"Thus, to the extent that the Fetal Protection Policy rseults in the transfer of an employee out of a position because she is unable to control her blood lead levels below 30 micrograms, the OSHA lead standard, as well as the contractual provisions in Article VIII (sections 1 and 11) and Article III (section 8), provide ample support. With respect to the denial of positions to employees, such as was the case with Voeltner, application of the Fetal Protection Policy is wholly consistent with Articles III, IV, and VIII; reliance on health and safety considerations in determining whether an employee is qualified for a position is the right of an employer which must be exercised to protect not only the employee, but others as well."

The Union points out that the right of the Company to make reasonable plant rules and regulations within the authority set forth in Article IX, paragraph 8 of the labor contract, is that any such rules and regulations are "subject to the other provisions of this contract." They state at pages 16-17 of their brief that,

> ". . . In substance, while the Union claims the FPP is unreasonable and will argue this point more fully infra, that nonetheless even if it is assumed arguendo that the FPP is a reasonable rule/policy the Company still would be precluded from implementing such rule *during the term of the contract* in that it literally abrogtaed the existing seniority rights of an entire class of employees under Article III and the transfer rights as well under Article IV."

The Union stated its view that the subject matter underlying the FPP constitutes a mandatory subject of bargaining. Had the Company insisted on bargaining the matter of an FPP policy during the contract negotiations leading to the current labor agreement, the Union would have been obligated to negotiate on such matter with the Company. The Company, however, did not make any proposal or raise any discussion about any anticipated FPP policy at any time during contract negotiations leading to the current labor agreement.

The Union argues that ever since female employees first became employed by the Company sometime after 1964, there never has been a distinction made between female employees and male employees for purposes of seniority and transfer rights or a distinction made between jobs to which those rights applied.

The Union argued that the General Motors arbitration decision decided by Arbitrator Arthur Stark, was distinguishable from this case. They argue that the GM Company had always precluded fertile female employees from working in jobs where they would be exposed to

lead. Additionally, the GM arbitration case was decided in 1978 immediately prior to the issuance of the current OSHA lead standards. In the GM case the Union was trying to change a past Company practice of excluding fertile female employees from certain lead jobs at a time when there were no OSHA standards. In this case, the Company is ignoring 20 years of Company practice whereby they have never distinguished between female and male employees with respect to working on any job and they are doing so at a time when OSHA lead standards are in effect.

That brings one to the second major argument advanced by the Union with respect to the lead standards set by OSHA wherein they argue,

> "There is no dispute over the fact that *all* employees, both male and female, who work in jobs that expose them to lead, face certain risks to their health. Dr. Fishburn conceded this fact has been known for some 100 years (3 Tr. 60). Indeed, it was because of the risks attendant to working in jobs where the employee was exposed to lead that caused OSHA, after extensive hearings, to issue a lead standard on November 14, 1978, and that lead standard has at all time material herein been applicable to the Company.
>
> "In developing the lead standard OSHA did *not* ignore the risks of lead exposure to fertile female employees. Indeed, in the Preamble to the lead standard (Co. Exh. 7) OSHA dealt extensively with lead exposure and the reproductive system (Co. Exh. 7, pp. 52965-52967) and its conclusion was,
>
> > " 'Given the data in this record, OSHA believes there is no basis whatsoever for the claim that

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"[12] That the Company is subject to OSHA is borne out by the OSHA citation issued February 10, 1982 (Un. Exh. 4. Also see Co. Exh. 3 a, b, and c).

> women of childbearing age should be excluded from the workplaee in order to protect the fetus or the course of pregnancy. Effective compliance with all aspects of these standards will minimize risk to all persons and should therefore insure equal employment for both men and women. There is no evidentiary basis, nor is there anything in this final standard, which would form the basis for not hiring workers of either sex in the lead industry. . .'

(Co. Exh. 7, p. 52966). These findings were upheld in United Steel Workers of America, supra, 647 F2d at 1256-1257.

"It must be emphasized that the Union is not seeking to have the Company ignore the lead standard that was issued by OSHA. On the contrary, it is the Union's position that the lead standard issued by OSHA and upheld by hte Circuit Court of Appeals for the District of Columbia constitutes a *reasonable* standard applicable for *all* employees, including fertile female employees, and that therefore insofar as the Company's FPP treats all fertile female employees differently it is the FPP that is unreasonable.[13]

"[13] It is clear that under Article IX paragraph 5 of the labor contract the Union could not seek to have the Company ignore the OSHA lead standard (See Jt. Exh. 1, p. 72). However, the FPP is not mandated by any law but in fact is inconsistent with the only legally and objectively developed lead standard that is applicable to the work place and which has been formulated by the federal agency having jurisdiction to do so."

The Union argued that the medical removal protection (MRP) provision of the OSHA lead standard constitutes one of the most important features of that law. A relevant portion of the MRP provision states as follows:

> "Where an employer, although not required by this section to do so, removes an employee from exposure to lead or otherwise places limitations on an employee due to effects of lead exposure in the employee's medical condition, the employer shall provide medical removal protection benefits to the employee equal to that required by paragraph (k)(2)(1) of this section . . ."

Without detailing or distinguishing certain qualifications or exceptions, the MRP generally continues for a period of 18 months from the point of an employee's removal from a lead exposure position. The Union addresses what it views as adverse impact on employees affected by the FPP and the manner in which such impact violates contractual rights of such employees in its brief as follows:

> "The FPP clearly places limitations on the female employees of childbearing capabilities and since the capability to bear children is clearly a 'medical condition', the FPP is wholly inconsistent with Section 1910.1025 (k)(2)(vii) of OSHA's Regulations in that the Company provides no medical removal protection benefits to employees such as Cathy Voeltner under its FPP.
>
> "It is wholly undisputed that the job to which Cathy Voeltner sought to transfer to under Article IV of the labor contract would have paid her more than the job she was in. The Company, however, claimed that under its FPP Cathy could not have such job or in essence it placed limitations on Cathy but it provided her no maintenance of earnings relative to the job that it was denying to her the opportunity to have and which she otherwise was clearly qualified for by virtue of her seniority.
>
> . . .
>
> "What the Company is really doing under the guise of the FPP is nothing other than 'construc-

tively removing' the fertile female employees from so called "unacceptable jobs" but failing to afford them the MRP benefit that would otherwise be required under 1910.1025 (k) (2) (vii) were these female employees to be literally placed in the job and then immediately removed. Indeed, the so called 'grandfather' exception under the FPP has nothing to do with health and safety but was more a means by which the Company could evade paying the MRP benefit.

. . .

"The Union submits that if the Company was really concerned only with the health and safety of the potential fetus of any of its fertile female employees, then the appropriate action to have been taken *during the term of the labor contract* would have been to recognize the female employees seniority rights under Article IV of the labor contract and on her personnel record place her in the job to which she was entitled *and then remove her* from that job but then provide the MRP benefit which would assure to her the higher earnings she was entitled to.

"In this manner the female employee would not have been financially hurt by the deprivation of her seniority rights and the health of the prospective fetuses would have remained as under the FPP. However, instead of compensating the female employees for the deprivation of their rights, the Company instead placed the whole cost of its FPP on the backs of these female employees."

It must first be noted that there is no contractual provision that directly or specifically addresses the subject matter of this dispute. Each party argues the merits of its respective case from the standpoint that the extension of certain basic labor relations principles applies to the case in their favor.

The major principle upon which the Employer bases its position is that under Article IX, Section 8 of the

Collective Bargaining Agreement, it has specifically reserved the right to direct the working force and to make reasonable plant rules and regulations. The Company contends that the FPP falls within that right and that it is reasonably and medically necessary for the welfare and safety of its employees and particularly the unborn children of its employees.

The Union relies on the basic labor relations principle that during the term of an existing Collective Bargaining Agreement, the Employer cannot unilaterally change through rule making or otherwise, the wages, hours, and conditions of employment of employees covered by the Collective Bargaining Agreement. The Union's position is that the Company's right to make and implement reasonable rules is limited to the extent that where any proposed change or rule would serve to adversely effect or impact upon employees covered by the labor agreement, the Company would be required to negotiate such rule and its impact thereon with the Union before it could be put in place. They argue that the FPP rule is in that category. It does adversely affect the right of employees to bid or transfer into higher paying jobs and it therefore must be first negotiated with the Union before it can be put in place.

There are many facets and considerations that bear on this dispute. The 1978 arbitration decision on this subject matter issued by Arbitrator Arthur Stark in a case between the UAW and General Motors Corporation was entered into evidence by the Company and both parties have argued the relevancy of the reasoning in such case to considerations presented in this case. The Union argued that the GM case is distinguishable because in GM the Company never had permitted female employees to work in jobs where there was lead exposure and the Union was attempting to change such past Company policy. While those facts are different from the facts in this case, a reading of Arbitrator Stark's deci-

sion reveals that the issues raised by the parties and the basis of the decision by Arbitrator Stark did not concern any past practice argument or consideration. At paragraph (40) Arbitrator Stark stated,

> "It is the Umpire's finding, then, that Management's policy here in issue is based on reasonable medical evidence, is not arbitrary or capricious, and does not reflect an improper exercise of its Paragraph (8) rights."

It appears that the paragraph (8) rights referred to therein were those type rights referred to in this case as Article IX, Section 8 rights of management. It appears to this arbitrator that Arbitrator Stark based his decision on considering whether or not there was reasonable medical evidence to support the need or desirability of a policy by General Motors to exclude all female employees of childbearing capabilities from certain designated jobs that involved lead exposure.

One is unable to determine the lead level standards under which GM declared jobs unacceptable as lead exposure jobs so as to be able to compare it to the levels by which the Company did the same thing in this case. The case states that the Union had agreed to approximately 100 jobs that were lead exposure jobs as designated by the Company but that they retained the right to challenge the Company's determination of any subsequent jobs as constituting lead exposure jobs. It would therefore appear that the Company was utilizing some level or standard by which it classified a job as a "lead exposure" job. In this case, the Company has set the standard, stated for simplification purposes, as 30 micrograms.

The Company presented a substantial volume of documentary evidence and evidence through testimony of expert witnesses on the subject matter of lead exposure directed at establishing the existence of a reasonable medical basis for a fetal protection policy. Such evidence does

factually show that there has been an ever increasing awareness and published medical and other type literature that clearly establishes an increased concern of lead exposure to employees, their health and in particular, the effect upon an unborn child.

The Company presented testimony by three witnesses directed at establishing the medical and business necessity for establishment of the FPP. Testimony of Jean M. Beaudoin, the manager of Health, Safety and Environmental Control for the Company was to the effect that the previous volunteer counseling program simply was not proving sufficiently satisfactory to reduce the risk and exposure to potential liability to the Company's satisfaction. In a letter to the Union dated March 10, 1983 and entered as Company Exhibit No. 8, said witness identified 22 different medical references on the subject of fetal protection and indicated that after the Company's thorough review of the developing body of scientific information on the subject, that they determined that a need existed to institute a fetal protection program.

The other two witnesses who testified were doctors of medicine with specialty knowledge and experience in occupational medicine and toxicology. Both medical experts testified to the issuance of a large volume of medical studies and documentation during the last decade. Both experts agreed and stated that the medical evidence has indicated the existence of a real and serious risk to persons exposed to lead. Such evidence further establishes that children under the age of 5 years are particularly susceptible to the toxic effects of lead exposure. They further agreed in their testimony to the fact that medical studies have established that the fetus is even more sensitive and susceptible to damaging effects by exposure to lead than are children. Both experts testified that the medical evidence now indicates that the blood lead levels for fetus and children above which the

fetus and child is at risk, is between 25 and 30 micrograms per 100 milileters of blood.

Based upon the large volume of documentary medical evidence and agreed upon and unrefuted testimony of expert witnesses dealing with the subject matter, the arbitrator finds that the Company has established by overwhelming evidence the existence of a reasonable necessity for a fetal protection policy. The Company's obligation to be concerned and to safeguard the health and safety of its employees includes concern for the unborn children of its employees as well. Although clearly not a controlling motivation for the Company's decision to implement an FPP, consideration of exposing the Company to potential law suits constitutes a legitimate concern on the part of the Employer and reasonable steps to protect one's self against such risk would constitute a reasonable business necessity.

In this case the Union does not factually contest the opinions expressed by the Company's medical witnesses to the effect that the unborn fetus and children should be protected. What the Union contends is wrong with the Company's FPP, is that it constituted a policy instituted during the term of a contract which *significantly* impacted and limited the contractual rights of employees to bid into higher paying jobs. Because of such major effect upon employees by the FPP, the Employer should have been obligated to refrain from such action until agreement was reached with the Union through negotiations on any such changes.

That position raises the question of whether or not the FPP policy in its application imposes arbitrary and unreasonable restrictions on otherwise existing contractual rights of employees. In other words, are the rights of the employees that are impaired or restricted by the policy of greater importance and concern than are the concerns for which the policy was created? The Union appears to have attacked the policy from a number of

viewpoints. First, they seem to argue that the existing OSHA standards should be applied for removal of employees from any particular job and that the implementation of a blood lead level standard lower than that set by OSHA for all employees is unnecessary and violates the contract. Secondly, if one assumes or finds that it is permissible for the Company to establish an FPP with blood level standards lower than that of OSHA, the FPP is still improper because of certain specific features of the policy. The Union points first to the applied standards by which the Company classifies a particular job as unacceptable. They argue that the Company measures such job on the basis of whether or not any employee who has worked on such job during the past year has at any one point in time had a blood lead reading greater than 30. They argue that the blood lead reading of one employee simply has no bearing upon what the blood lead reading of another employee would be on that same job. The blood lead readings of employees differ considerably based upon a number of individual factors such as work practices, levels of skills, etc. They argue that it is arbitrary to exclude an employee from a job simply because another employee incurs a high blood level reading at one point during a year on such job.

The third specific element of the FPP which the Union argues serves to invalidate the policy concerns the fact that under certain circumstances the application of the FPP in prevents employees from the right to bid into higher paying jobs on the basis of classifying them as "unacceptable" jobs. The Company policy effectively circumvents the medical removal protection to which an employee would otherwise be entitled to a job removal under OSHA and on that basis it is invalid.

After due consideration of the many faceted considerations that bear on this case, the arbitrator finds and concludes that the business and medical necessity for protection of the unborn child constitutes a major legiti-

mate concern. The urgency of such concern is established to a much greater degree at the time this case arose than existed in 1978 when Arbitrator Stark engaged in analysis and consideration of the GM policy. In the GM case, the decision indicates that GM instituted a lead exposure policy in 1952 and that no women were employed in the battery plants of the Delco Remy Division because of lead exposure. The specific case before Arbitrator Stark involved the Company's extension of the fetal protection policy to various jobs in other than battery plants, such as assembly and other areas where there existed potential exposure to lead. The FPP policy in this case appears to be much less limiting on female employees than did the policy at GM, and particularly at their battery plant.

It seems to the undersigned that in view of the strong evidence showing potential risk to unborn children at blood lead levels above 25 to 30, that one cannot equate such risk to an unborn child to that of an employee being deprived of bidding into a job that may pay slightly more money. There simply cannot be a comparison between the two. Even if the deprivation of allowing an employee to work in a higher lead job might result in a layoff on some occasion, one still cannot compare on the same level the fact that an employee may be laid off for a period of time to the very real risk of permament nervous or neurological disabling condition that may result in the absence of the FPP. The health and welfare of future unborn children far outweighs any possible impact on or restriction of rights of employees under the Collective Bargaining Agreement.

With respect to the specific attacks upon the FPP above identified, the arbitrator is simply not sufficiently sophisticated nor knowledgeable in other potential available measuring standards by which a particular job could be classified as acceptable or unacceptable to determine whether or not the Company's method of determining an

unacceptable job by reference to certain levels of air lead during the preceding year along with the blood lead readings of incumbent employees upon such job during the preceding year, constitutes a reasonable or proper standard of measurement or whether it does not. In such respect, while the Union argues that it does not, no alternative methods have been advanced by the Union other than a trial basis by a claiming employee, that would individualize the job to the individual. The arbitrator is of the judgment that such individualized alternative would be unworkable. By the individual method, an employee would be placed in a job and would be removed only after such employee's blood lead level had passed the allowable threshold. At such point, if such employee were pregnant, the damage would already be done. Clearly under all medical information herein available, such result would be unacceptable. It is possible that the scenario described by the Union, which is the extreme scenario, that a particular job may be classified unacceptable in a case where but a single employee working on such job for the past calendar year had incurred a blood lead reading in excess of 30 on but one occasion, that classification of such job under those facts as unacceptable would be unreasonable. There is no evidence in the record to the effect that any of the jobs that were classified as unacceptable by the Company in fact were that marginal. The direct evidence in the record reveals that the panel-tack operator job for which the grievant bid far exceeded the allowable standard. The evidence reveals that air lead readings during the period January to July 1983 at the panel-tack operator position had ranged from 29 to 160, with an average of 77 and a median of 53. Blood lead readings of incumbent employees working on such job during the period year had ranged from 34 to 51, with an average of 38.5 and a median of 37. Clearly, such job far exceeded the minimum allowable standard for it to be found an acceptable job. The arbitrator finds no basis in the record to chal-

lenge the panel-tack operator job having been found an unacceptable job within the application of the FPP.

With respect to the Union's argument that the FPP policy in effect circumvents the medical removal protection otherwise afforded by OSHA standards, the arbitrator is of the judgment that such position does not contain merit. First, if the classification of a particular job as unacceptable is proper in the first instance under the FPP, and the FPP is otherwise found to be proper, then there simply cannot be a "removal" from such job. To hold otherwise, would permit every female employee of child-bearing capacity to bid on every higher paying job that was ever posted even though if such job had been offered to them absent all other considerations, the employee would not have taken it.

The arbitrator is persuaded on the basis of the total record evidence, that a business and medical need has been established for the creation and implementation of a fetal protection policy which contains standards lower than presently exist under OSHA. Medical studies and evidence coming into existence subsequent to the passage of OSHA clearly establishes such necessity.

The undersigned finds that the necessity for protection of the unborn child in the interest of the health and welfare of its employees, far outweighs the adverse effects such policy potentially exerts upon bargaining unit employees. In all other respects, the arbitrator finds the policy to not be violative of any rights of the employees under the contract of sufficient significance to warrant removal and discontinuance of such policy. By such determination, the arbitrator is not saying that the Union in any way is deprived of the right to challenge or negotiate with the Company refinements of the application of the policy at the appropriate time or times nor of raising questions with the Company's application of its policy and procedures in determining what is and is not

acceptable or unacceptable jobs within the application of the policy.

The job of panel-tack operator to which grievant Cathy Voeltner bid in this case is found by the arbitrator to be one that is clearly "unacceptable" within the application of the fetal protection policy. The grievance of employee Voeltner is therefore without merit and on the basis of the above facts and discussion thereon, the undersigned renders the following decision and

AWARD

That the grievance be dismissed.

Dated at Madison, Wisconsin this 22nd day of April, 1985.

/s/ Robert J. Mueller
ROBERT J. MUELLER
Arbitrator

EXHIBIT B

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

Enter Charge Number

☐ FEPA

☒ EEOC 055-842687

Equal Rights Division—DILHR and EEOC
(State or local Agency, if any)

Name *(Indicate Mr., Ms., or Mrs.)*
Local 322, Allied Industrial Workers of America, AFL-CIO

Home Telephone No. *(Include Area Code)*
(414) 355-2800

Street Address
8021 W. Tower Avenue

City, State and Zip Code
Milwaukee, Wisconsin 53223

County
Milwaukee

Named Is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, State or Local Government Agency Who Discriminated Against Me *(If more than one list below.)*

Name
Johnson Controls Inc., Globe Battery Division

No. of Employees/Members
In excess of 200

Telephone Number *(Include Area Code)*
(414) 228-2357

Street Address
5757 North Green Bay Avenue

City, State and Zip Code
Milwaukee, Wisconsin 53209

Cause of Discrimination Based on *(Check appropriate box(es))*

☐ Race ☐ Color ☒ Sex ☐ Religion
☐ National Origin ☐ Age ☐ Retaliation
☐ Other *(Specify)*

Date Most Recent or Continuing Discrimination Took Place *(Month, day, year)*
Ongoing

The Particulars Are *(If additional space is needed, attached extra sheet(s))*:

The above-named Employer unilaterally introduced a Fetal Protection Program that adversely affects female employees of childbearing capabilities in both the hiring and in other terms and conditions of their employment.

☒ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures. I declare under penalty of perjury that the foregoing is true and correct.

Local 322, Allied Industrial Workers of America, AFL-CIO

Charging Party *(Signature)*

By: /s/ Kenneth R. Loebel

Date 9/17/84

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Signature of Complainant

/s/ Kenneth R. Loebel

Subscribed and Sworn to Before Me This Date
(Day, month, and year)
17th day of September 1984.

/s/ Christine Becker
My commission expires 7/24/8

EXHIBIT C

NOTICE OF RIGHT TO SUE
(Issued on Request)

Certified: P602 974 886 JAB:kw

To:

Local 322, Allied Industrial Workers of America
8021 West Tower Avenue
Milwaukee, Wisconsin 53223

☐ On behalf of a person aggrieved whose identity is Confidential (29 C.F.R. 1601.7(a)).

From:

Equal Employment Opportunity Commission
Milwaukee District Office
310 West Wisconsin Avenue, Suite 800
Milwaukee, Wisconsin 53203-2211

Charge Number
055-84-2687/706#0000

EEOC Representative
Earl Benson, Compliance Manager

Telephone Number
414/291-1111

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 and the other information on the reverse side of this form.)

To the Person Aggrieved:

This is your Notice of Right to Sue. It is issued at your request. If you intend to sue the respondent(s) named in your charge. You Must Do So Within Ninety (90) Day of Your Receipt of This Notice: Otherwise Your Right to Sue Is Lost.

☐ More than 180 days have expired since the filing of this charge.

☒ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission

will be unable to complete its administrative process within 180 days from the filing of the charge.

☐ It has been determined that the Commission will continue to process your charge.

☐ ADEA—While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you obtained the right to sue under the Age Discrimination in Employment Act (ADEA) when you filed your charge, subject to a 60-day waiting period. ADEA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged discrimination.

☐ EPA—While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you already have the right to sue under the Equal Pay Act (EPA) (you are not required to complain to any administrative agency before bringing an EPA suit in court). EPA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged EPA underpayment.

An information copy of this Notice of Right to Sue

cc: (to respondent) Globe Battery Division
Johnson Controls Inc.
(Certified) P602 974 887

On Behalf of the Commission

Typed Name and Title of Issuing Official

/s/ Earl L. Benson
for Joseph W. Wiley, District Director
Date 3/12/85

cc: Kenneth R. Loebel, Attorney
(Certified: P602 974 888)
Stanley S. Jaspan
(Certified: P602 974 889)

Supreme Court, U.S.
FILED
MAY 9 1991
OFFICE OF THE CLERK

No. 90-1537

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent

May 9, 1991

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Does *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), prevent a party from collaterally attacking an adverse judgment that other parties have successfully appealed, where that party deliberately chose not to appeal the judgment?

RULE 29.1 LIST

Johnson Controls, Inc. has no parent. It holds a controlling interest in the following companies which are not wholly-owned subsidiaries: Technotrim, Inc.; Trim Master, Inc.; Johnson Controls (NZ) Ltd.; Naue-JCA Verwaltungsgesellschaft mbH; Naue-JCA Objeckt Bochum GmbH & Co. KG; Johnson Controls (M) SDNBHD; Naue GmbH & Co. KG; Vintec Company; Yokogawa Johnson Controls Corp.; Johnson Yokogawa Corp.; Pannabco; Pannesma; Lapeer Trading Co.; IllumElex Corporation; Seating Systems Technology, Inc.; Hyperion Corp.; Setex, Inc.; Naue & Naue GmbH; Eurosit S.A.; Johnson Controls Saudi Arabia Ltd.; and Integrated Communication Systems.

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No. 90-1537

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Johnson Controls, Inc., by its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of the judgment in *Local 322, Allied Industrial Workers v. Johnson Controls, Inc.*, 921 F.2d 732 (CA7 No. 90-1259, Jan. 11, 1991).

COUNTERSTATEMENT OF THE CASE

Contrary to the impression conveyed by the petition, the issue presented in this case is not the legality under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17, of Johnson Controls' former fetal protection policy, a question recently decided by this Court in *International Union, UAW v. Johnson*

Controls, Inc., 111 S. Ct. 1196 (1991). Johnson Controls is, of course, complying with the Court's decision in the *UAW* case and has discontinued its fetal protection policy at all its battery plants, including the plant involved in this proceeding.

The *only* issue presented on review is whether the doctrine of res judicata was appropriately applied to the unique facts of this case. Specifically, the narrow question is whether a party that deliberately chose *not* to appeal an adverse judgment can, in order to obtain retrospective relief, collaterally attack that judgment based on the reversal obtained by other parties who did seek review. This Court has already directly answered this question in the negative in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

The Proceedings Below

The AIW represents certain employees at Johnson Controls' battery plant located in Milwaukee, Wisconsin. In March 1985, the AIW commenced this action, in which it alleged that Johnson Controls' fetal protection policy violated Title VII. At that time, the similar action brought by the United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), which was recently before this Court, was already pending before the same district judge. Pet. App. 2a. The AIW was well aware of the pendency of the *UAW* case when it filed its separate action. AIW Civil Cover Sheet at 2 (Mar. 19, 1985).

As this Court knows, summary judgment was entered in favor of Johnson Controls in the *UAW* case and the UAW appealed to the Seventh Circuit Court of Appeals. Rather than separately litigating its own case, the AIW moved to intervene in the *UAW* appellate proceedings, specifically requesting that it be granted "full rights as [a] part[y], including the right to supplement the record . . . and the right to file briefs and to be heard on oral

argument." Motion to Intervene at 6 (Mar. 11, 1988).[1] In support of its motion, the AIW argued to the Seventh Circuit that "permitting the AIW to intervene . . . [would] permit this Court [of Appeals] in *one judicial setting* to hear and decide whether the Employer's [fetal protection policy], which is the identical [fetal protection policy] at all the UAW plants as it is at the AIW plant, is lawful under Title VII." *Id.* ¶ 9, at 4-5 (emphasis added). The AIW also represented to the Seventh Circuit that judicial resources would be saved by allowing intervention because it would be bound by that court's decision in the *UAW* proceedings. *Id.* ¶ 11, at 5.

The Seventh Circuit granted the AIW's motion. Pet. App. 3a. As a result, the AIW supplemented the appellate record in the *UAW* case with record materials from its original district court action, filed full briefs on the merits, and orally argued the merits of the case on two occasions, first before a panel of the Seventh Circuit and later, over the objection of the UAW, before the en banc appellate court. Pet. App. 3a. When the district court learned of this intervention, it stayed the AIW's separate action. Pet. App. 29a.

The Seventh Circuit issued its decision in favor of Johnson Controls in September 1989, *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (CA7 1989) (en banc), and *only* the UAW and related parties requested review by this Court. The AIW did not. Instead, as described by the AIW in its petition, the AIW made a deliberate tactical choice to "prosecute its own action" in the district court *rather than* "seeking review" before this Court. Pet. 16; see also Pet. 16-17 & n.8. In response, Johnson Controls moved the district court to dismiss the AIW's original action on res judicata grounds.

---

[1]The AIW had moved to intervene at the district court level in the *UAW* action, but not until two and one-half years after the *UAW* action was commenced and over one and one-half years after the AIW instituted its own action. Pet. App. 2a. The district court denied that motion as untimely. Pet. App. 33a.

The district court granted this motion. The court reasoned that the AIW had achieved full party status by its intervention in the *UAW* appellate proceedings and that the AIW's attempt to persuade the court otherwise "border[ed] on arguing in bad faith." Pet. App. 22a. The court held that, as a party, the AIW was bound by the Seventh Circuit's judgment and, therefore, precluded by the doctrine of res judicata from pursuing the same claim in a separate action. The district court found that the AIW's contrary arguments were particularly "untenable" because of the AIW's "own language in requesting [full party] status." It concluded that the AIW had "been hoisted on its own petard." Pet. App. 20a.

The Seventh Circuit agreed. It emphasized that it had in fact "granted [the AIW] full rights as a party on appeal when [it] allowed [the AIW] to intervene." Pet. App. 5a. Further, the court rejected the AIW's argument that it was not given a "full and fair opportunity" to litigate the merits of its attack on Johnson Controls' fetal protection policy, stating that it had "treated and resolved" all arguments advanced by the AIW on the merits of the case. Pet. App. 6a; see also Pet. App. 4a, 7a. Finally, the Seventh Circuit agreed with the district court's conclusion that a litigant who is allowed to intervene as a full party on appeal is bound, pursuant to the doctrine of res judicata, by the appellate court's judgment.

REASONS FOR DENYING THE WRIT

The AIW's petition for certiorari should be denied for several reasons:

First, this Court has squarely held that a party who does not appeal an adverse judgment cannot benefit from the reversal of that judgment obtained by separate parties who did appeal. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

The Seventh Circuit's application of res judicata in this case is not only consistent with the pronouncements of *Moitie,* it is mandated by them.

Second, the Seventh Circuit's holding that a litigant who intervenes on appeal is bound by the decision issued in those appellate proceedings is consistent with well-established principles of the doctrine of res judicata and intervention developed by this Court and the lower federal courts.

Third, the Seventh Circuit appears to be the first federal court of appeals to directly address the issue of the effect for res judicata purposes of intervention at the appellate level. Accordingly, there is no conflict in the circuits regarding this issue. Further, intervention for the first time in the court of appeals happens so rarely that this case presents an extremely novel issue not likely to recur.

For all these reasons, review in this case is not warranted.

I. THIS COURT'S DECISION IN *FEDERATED DEPARTMENT STORES, INC. V. MOITIE* SQUARELY GOVERNS THIS CASE AND MANDATES THAT THE DOCTRINE OF RES JUDICATA BE APPLIED TO BAR THE AIW'S ATTEMPT TO AVOID THE PRECLUSIVE EFFECT OF THE JUDGMENT THE AIW DELIBERATELY CHOSE NOT TO APPEAL.

Johnson Controls has discontinued its fetal protection policy at all plants, including the one involved here. The sole issue presented by the petition is whether the AIW can obtain retrospective relief for past application of the policy. The AIW argues that the judgment of the Seventh Circuit entered against it in *International Union, UAW v. Johnson Controls, Inc.,* 886 F.2d 871 (CA7 1989) (en banc), does not bar such relief because the decision "has since been reversed by this Court." Pet. 10. This argument ignores two crucial points. First, the AIW chose not to appeal the judgment it is now seeking to avoid. Second, this Court has al-

ready directly held that a party who fails to appeal cannot avoid the application of res judicata when the judgment is reversed on an appeal instituted by other parties to the case.

The AIW's petition makes clear that the AIW made a deliberate strategic decision not to seek review of the court of appeals' judgment in the *UAW* case. The AIW states that it was "cautious" about seeking review "because the legal landscape was at that time far from clear" and because it had "doubt[s]" about whether it "had the necessary control to advance the arguments and proofs that it wanted to make in order to challenge the assumptions of the district court" in the *UAW* case. Pet. 16-17 & n.8. The AIW is apparently saying that it did not seek review because it thought it would lose on the merits before this Court. According to the AIW, because of this concern it *instead* decided to "prosecute its own action which had remained pending before the district court." Pet. 16. Now that the fears that prompted the AIW to make a conscious choice to forego review have proved unfounded, the AIW seeks to reap the benefits of the reversal obtained in the appeal that was pursued by the UAW. However, this Court's decision in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981), prevents the AIW from doing so.

Moitie involved precisely the same situation as here—a litigant who decided not to seek review of a lower court's judgment, but who subsequently attempted to take advantage of a reversal obtained by those who did. In *Moitie,* several groups of retail purchasers filed actions in federal court alleging price-fixing against a number of department stores. These actions were dismissed on the grounds that retail purchasers could not allege an "injury" within the meaning of the federal antitrust laws. *Id.,* at 395-396. Most of the plaintiffs appealed. However, some did not and instead refiled their claims in state court. After the refiled claims were removed to federal court, they were dismissed on the grounds of res judicata. The res judicata judgment was appealed. *Id.,* at 396-397. In the meantime, this Court had issued a decision

holding that a retail purchaser could allege an "injury" sufficient to state a price-fixing claim. In response, the Ninth Circuit Court of Appeals reversed the judgment in the cases that had been appealed on the merits. *Id.*, at 397. It also later reversed the res judicata judgment against the plaintiffs who had failed to appeal the decision on the merits. The Ninth Circuit held that while a "strict application of the doctrine of *res judicata*" would preclude these plaintiffs' separate claims, it was unfair to apply the doctrine when the underlying judgment had been reversed as to other parties. *Moitie v. Federated Dep't Stores, Inc.*, 611 F.2d 1267, 1269 (CA9 1980).

This Court reversed, holding that the Ninth Circuit's decision was "an unprecedented departure from accepted principles of res judicata" and was "all but foreclosed by [this Court's] prior case law." 452 U.S., at 400.[2] This prior case law established that "the res judicata consequences of a final, unappealed judgment on the merits" are *not* "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Id.*, at 398 (citing *Angel v. Bullington*, 330 U.S. 183, 187 (1947); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Wilson's Executor v. Deen*, 121 U.S. 525 (1887)). The Court explained that

> "an 'erroneous conclusion' reached by the court in the first suit does not deprive the defendants in the second action 'of

[2]The Court also found that the "exception" to the doctrine of res judicata "created" by the Ninth Circuit was in conflict with the decisions of other courts of appeals, which uniformly had held that "an adverse judgment from which no appeal has been taken is res judicata and bars any future action on the same claim, even if an authoritative contrary judicial decision on the legal issue involved is subsequently rendered in another case." 452 U.S., at 400 n.4 (citing *National Ass'n of Broadcasters v. FCC*, 554 F.2d 1118, 1124 (CADC 1976); *Clouatre v. Houston Fire & Casualty Co.*, 229 F.2d 596, 597-598 (CA5 1956); *Appleton Toy & Furniture Co. v. Lehman Co.*, 165 F.2d 801, 802-803 (CA7 1948); *Ripperger v. A.C. Allyn & Co.*, 113 F.2d 332, 333 (CA2), cert. denied, 311 U.S. 695 (1940)).

> their right to rely upon the plea of res judicata. . . . A judgment merely voidable because based upon an erroneous view of the law is *not* open to collateral attack, but can be corrected *only* by a direct review and *not* by bringing another action upon the same cause [of action].' " *Id.*, at 398 (quoting *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 325 (1927) (emphasis added)).

The Court also held that equitable considerations should not enter into the decision whether to apply the doctrine of res judicata. Specifically, "[t]his Court recognizes no general equitable doctrine . . . which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party." *Id.*, at 400. Indeed, the Court held that a party who decides not to appeal is particularly undeserving of the application of any possible "equitable" exception to the doctrine of res judicata. This Court found that the *Moitie* plaintiffs had "made a calculated choice to forego their appeals" and, therefore, they should not "be the windfall beneficiaries of an appellate reversal procured by other independent parties." *Id.*, at 400-401.[3]

The Court concluded that as long as the technical elements of res judicata are present—a final judgment on the merits, involving the same claims and the same parties—res judicata must be applied, even if the judgment is reversed as to other parties based on a subsequent decision of this Court. The Court reasoned that " '[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the

[3]The two Justices who concurred in the judgment also agreed that a party "who makes a deliberate tactical decision not to appeal" should not obtain relief from the doctrine of res judicata because "there is a special need for strict application of res judicata in complex multiple party actions . . . so as to discourage 'break-away' litigation." 452 U.S., at 403 (Blackmun, J., joined by Marshall, J., concurring).

very purpose of the doctrine of res judicata to avert.' " *Id.*, at 398-400 (quoting *Reed v. Allen*, 286 U.S. 191, 201 (1932)).

This case is just like *Moitie*. As in *Moitie*, an adverse judgment was rendered against multiple parties. Like some of the plaintiffs in *Moitie*, the AIW made a "calculated choice" not to appeal that judgment and instead attempted to pursue the same claim in a separate action. As in *Moitie*, other plaintiffs appealed and obtained reversal of the judgment based on a change in the law announced by this Court. Therefore, just like the non-appealing *Moitie* plaintiffs, the AIW's "calculated choice" to forego review precludes the AIW from being the "windfall beneficiary" of the reversal obtained by the UAW.

Moitie not only squarely governs this case, it has been uniformly construed by the courts of appeals. See, *e.g.*, *United States v. Lumbermens Mut. Casualty Co.*, 917 F.2d 654, 663 (CA1 1990) (nonappealing parties cannot benefit from reversal of judgment with regard to parties who did pursue an appeal); *In re Fine Paper Antitrust Litigation*, 840 F.2d 188, 194-195 (CA3 1988) (motion for relief from judgment pursuant to Rule 60(b)(6) denied when "only showing" made in support of motion "is that litigants who pursued appellate remedies fared better than litigants who did not"); see also *Erspan v. Badgett*, 659 F.2d 26, 28 (CA5 1981), cert. denied, 455 U.S. 945 (1982) (final, unappealed state court judgment was binding and enforceable despite intervening change in the law); *RSI (India) Pvt., Ltd. v. United States*, 699 F. Supp. 929, 933 (Ct. Int'l Trade 1988) (plaintiffs who did not join in appeal because "'they were unable to bear the additional expense of further litigation'" were not entitled to the benefits of an injunction issued pending appeal on behalf of the appealing plaintiffs). Accordingly, contrary to the AIW's assertions, there is no conflict with the decisions of this Court (or among the circuits) for this Court to resolve.

II. THE SEVENTH CIRCUIT'S HOLDING THAT A PARTY WHO INTERVENES ON APPEAL IS BOUND BY THE COURT OF APPEALS' JUDGMENT IS CONSISTENT WITH WELL-ESTABLISHED PRINCIPLES OF RES JUDICATA AND INTERVENTION.

The AIW attempts to get around the result mandated by *Moitie* by arguing that the doctrine of res judicata should not apply to a party who intervenes for the first time on appeai. The AIW contends that because it did not participate in the *UAW* case until the appellate stage it did not have a "full and fair opportunity to litigate" its challenge to Johnson Controls' fetal protection policy. Pet. 10-11. This argument is legally and factually incorrect.

The issue of whether a party who intervenes at the appellate level is bound by the judgment rendered in those proceedings has never been addressed by this Court or any other court of appeals. However, the Seventh Circuit's affirmative answer to this question is consistent with the general principles governing intervention and res judicata developed by this Court and the lower federal courts.

This Court has explained that "intervenors are considered *parties* entitled, among other things, to seek review by this Court." *Diamond v. Charles,* 476 U.S. 54, 68 (1986) (emphasis added). The lower federal courts have consistently applied this principle. See, *e.g., Schneider v. Dumbarton Developers, Inc.,* 767 F.2d 1007, 1017 (CADC 1985) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party."); *United States v. Oregon,* 657 F.2d 1009, 1014 (CA9 1982) (intervenors "enter the suit with the status of original parties"); *Marcaida v. Rascoe,* 569 F.2d 828, 831 (CA5 1978) ("an intervenor is treated as if he were an original party and has equal standing with the original parties"); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.16[6] (2d ed. 1987) ("once

intervention has been allowed the interven[o]r is a party for all purposes").

Concomitantly, the lower federal courts have also held that, because an intervenor gains full party status, the intervenor

> "renders itself 'vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party.' *United States v. Oregon,* 657 F.2d 1009, 1014 ([9th] Cir. 1981) (quoting 3B *Moore's Federal Practice* ¶ 24.16[6] (2d ed. 1981)). It is said to assume the risk that its position will not prevail and that an order adverse to its interests will be entered." *Schneider,* 767 F.2d, at 1017.

See *United States v. Oregon,* 657 F.2d, at 1014 (intervenors "are fully bound by all future court orders"); *Alaska v. Andrus,* 429 F. Supp. 958, 964 (Alaska 1977) ("[I]t is only [because] the intervenors requested to be allowed into this action that this judgment may be binding on them in the other case."), aff'd on other grounds, 591 F.2d 537 (CA9 1979); *Cartolano v. Tyrrell,* 421 F. Supp. 526, 530 (ND Ill. 1976) ("fact that plaintiff herein entered the previous action as [an] intervenor does not excuse him from the binding effect of that final judgment"); 3B J. Moore & J. Kennedy, *supra,* ¶ 24.16[6] ("The interven[o]r is bound by future orders, unless the intervention has been specially limited.") (footnote omitted).

This conclusion that an intervenor is bound by any judgment rendered in the suit it chose to join is completely consistent with this Court's res judicata case law which holds that a final judgment is binding on all *parties* to the litigation. See, *e.g., Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948) ("when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privities are thereafter bound"); *Baltimore Steamship Co. v. Phillips,* 274 U.S. 316, 319 (1927) ("[i]f upon the same cause of action, the judgment

or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties").

Further, as found by the court below, this conclusion should apply with at *least* equal force to intervention at the appellate level. Courts permit intervention on appeal "only in exceptional circumstances for imperative reasons." *In re Grand Jury Investigation,* 587 F.2d 598, 601 (CA3 1978); see *Amalgamated Transit Union Int'l v. Donovan,* 771 F.2d 1551, 1552 (CADC 1985), appeal dismissed, 475 U.S. 1042 (1986); 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1916, at 456 (2d ed. 1986). To hold that an appellate intervenor can avoid the preclusive effect of the judgment on appeal would render meaningless the extraordinary step of granting appellate intervention.[4]

Here, the AIW knew when it filed its motion to intervene that it would be bound by the Seventh Circuit's decision if its motion were granted. Not only did the AIW request "to intervene with full rights as parties (sic)," the AIW expressly acknowledged in its intervention motion that it *would* be bound by the Seventh Circuit's decision and in fact argued that the motion should be granted *because* of this binding effect.

> "Granting the AIW's motion for leave to intervene . . . would overall result in economizing the expenditure of judicial resources in that the ultimate decision of this Court would necessarily also be dispositive of the AIW's challenge

[4]Neither of the cases cited by the AIW, *Brown v. Felsen,* 442 U.S. 127 (1979), or *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971), even remotely suggests that the doctrine of res judicata should not apply to an appellate intervenor. In *Brown v. Felsen,* this Court held that a judgment in a debt collection action does not bar the debtor from later seeking to discharge that debt in a bankruptcy action. *Blonder-Tongue* involved the doctrine of collateral estoppel, and the Court held that, in certain circumstances, mutuality of parties was not required for *that* doctrine to apply. These cases in no way support the AIW's attempt to carve out an exception to the doctrine of res judicata for appellate intervenors.

> to the [fetal protection policy] in [the AIW's original court action]." Motion to Intervene ¶ 11 (Mar. 11, 1988).[5]

The Seventh Circuit granted the motion and expressly gave the AIW full party status. In its order granting intervention, the court stated that the AIW "may participate in this appeal as an intervening appellant." Pet. App. 5a. Thereafter, the AIW fully participated in the appellate proceedings. As the Seventh Circuit described,

> "[t]here were no limitations placed on [the AIW's] participation in the appeal. [The AIW] was allowed to supplement the record with information obtained during discovery with Johnson. [The AIW] briefed and argued the merits of the fetal protection policy. [The AIW] was listed as a party in the case's judgment. As the district court concluded, [the AIW's] contention that its appearance in the appeal was for a limited purpose is 'patently untrue,' and 'a mischaracterization of [its] role in that action . . . .' " Pet. App. 6a.

See also Pet. App. 5a ("The major portions of [the AIW's] brief and oral argument were devoted to the merits of the fetal protection policy. That is because we granted [the AIW] full rights as a party on appeal when we allowed [the AIW] to intervene."); Pet. App. 20a-22a (in light of the AIW's previous representations to and participation before the Seventh Circuit, its present arguments are "incredible" and "untenable," and "border[ ] on arguing in bad faith").

The full participation by the AIW before the Seventh Circuit belies the AIW's claim to this Court that it did not have a "fair

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[5]In light of all these representations to the Seventh Circuit, the AIW's argument that it was denied due process is specious. The AIW not only had notice that its intervention on appeal carried with it the risks as well as the benefits of full party status, the AIW argued that the motion should be granted for that reason. In any event, the due process issue is not properly before this Court because it was never raised in the court of appeals or the district court. *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 611 (1990); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983).

and full opportunity to litigate" its case through appellate intervention. Further, while the AIW asserts in its petition that the Seventh Circuit did not address the arguments it raised on appeal, the Seventh Circuit has stated that this contention is simply untrue.

> "[The AIW] finally argues that res judicata should not apply because the Seventh Circuit did not address all the arguments it raised in its briefs, and that it was therefore not given an opportunity to fully and fairly litigate its opposition to the fetal protection policy. . . .
>
> "However, . . . [*the AIW's*] *claims were treated and resolved by the Seventh Circuit,* although obviously not to [the AIW's] satisfaction. [The AIW's] suggestion that the court did not address whether 'other alternative acceptable practices and policies . . . could have been followed with far less discriminatory effects on fertile female's right to equal employment opportunities' *is false*. Although we wrote that 'the UAW failed to present facts sufficient for a trier of fact to conclude that less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children from the substantial risk of harm lead exposure creates . . .', 886 F.2d at 891, that conclusion was necessarily based on the whole record before us, *including evidence put forward by* [*the AIW*]. . . . [*The AIW's*] *claims were raised and addressed,* and now [the AIW] is bound by its decision to become a party on appeal, and by our decision in favor of Johnson Controls." Pet. App. 6a-7a (emphasis added).

Obviously, the Seventh Circuit is in the best position to say whether it fully considered the facts and arguments presented by the AIW. The court of appeals' statement that it *did* cannot fairly be challenged. Thus, not only is the Seventh Circuit's application of res judicata in this case consistent with the decisions of this Court (and the lower federal courts), but the AIW's contention that it did not have a "full and fair opportunity to litigate" its case before the Seventh Circuit is, in the words of both lower courts, "patently untrue." Pet. App. 6a (quoting district court).

III. CERTIORARI SHOULD BE DENIED GIVEN THE UNIQUE FACTUAL AND PROCEDURAL POSTURE OF THIS CASE.

Finally, this case involves very novel factual and procedural circumstances—intervention for the first time on appeal, the entry of an adverse judgment against the intervening appellant, a calculated decision by this unsuccessful intervening appellant not to seek review of the adverse judgment, *and* a reversal of that judgment obtained by other appellants who did seek review. This factual pattern is not likely to recur with any frequency, if at all. This is particularly true because intervention at the appellate level is granted "only in exceptional circumstances." *In re Grand Jury Investigation*, 587 F.2d at 601. Indeed, the "exceptional" nature of appellate intervention explains why there are no other decisions by the federal courts at any level which address the issue of whether an appellate intervenor is bound by the judgment on appeal. There is simply no need for this Court to address this unique issue of first impression at this time. If this factual situation continues to arise *and* a conflict develops in the circuits, the issue can be taken up by the Court at that time.

CONCLUSION

The employees represented by the AIW, like all other employees of Johnson Controls, are entitled to (and are receiving) Johnson Controls' full prospective compliance with this Court's *UAW* decision. For the reasons set forth above, the AIW is not entitled to retrospective relief based on the reversal of a judgment from which it deliberately decided not to seek review. Accordingly, the respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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